

No. 11075

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WESTERN LOAN AND BUILDING COMPANY,
a Corporation,

Appellant,

vs.

ALBERT C. ARTHUR and H. B. ESTES,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

AUG 17 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

M. PERELLI-MINETTI

704 South Spring Street

Los Angeles 14, Calif.

and

H. L. MULLINER

817 Continental Bank Building

Salt Lake City 1, Utah

For Appellees:

FRED A. WILSON

408 Andreson Building

San Bernardino, Calif. [1*]

In the Superior Court of the State of California,
in and for the County of San Bernardino

No. 51223

ALBERT C. ARTHUR AND H. B. ESTES,

Plaintiffs,

vs.

WESTERN LOAN AND BUILDING COMPANY,
a corporation,

COMPLAINT

For cause of action against the above named defendant, plaintiffs allege:

I.

That the defendant, Western Loan and Building Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Utah.

II.

That on the 1st day of April, 1944, the said defendant had and received the sum of \$4,337.50 to and for the use and benefit of the plaintiffs.

III.

That on the 8th day of May, 1944, plaintiffs demanded the payment by defendant to plaintiffs of the said sum of \$4,337.50.

IV.

That the said defendant has not paid said sum of [2] \$4,337.50, or any part thereof, to plaintiffs, and that there

is now due, owing and unpaid from defendant to plaintiffs the said sum of \$4,337.50, together with interest thereon at the rate of seven per cent per annum from the 8th day of May, 1944.

Wherefore, plaintiffs demand judgment against said defendant for the sum of \$4,337.50, together with interest thereon at the rate of seven per cent per annum from the 8th day of May, 1944, and for plaintiff's costs incurred herein.

FRED A. WILSON

Attorney for Plaintiffs.

[Verified.]

[Endorsed]: Filed Jun. 17, 1944, 9:35 a. m. Harry L. Allison, Co. Clerk; by Edith Campbell, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [3]

[Title of Superior Court and Cause.]

NOTICE OF MOTION AND PETITION FOR ORDER REMOVING CAUSE TO FEDERAL COURT

To the Plaintiffs. Albert C. Arthur and H. B. Estes; and to Fred A. Wilson, Their Attorney:

You will please take notice that on Monday, August 7, 1944, at the hour of 2:00 P. M. of said day, or as soon thereafter as counsel can be heard, in Department I, which is the Law and Motion Department, of the above-entitled court, the above defendant will move and petition the above-entitled court for an order removing the above-en-

titled cause from the above-entitled court where it is presently pending to the United States District Court in and for the Southern District of California, Central Division.

This motion and petition will be based upon the Petition for Removal (a copy of which is attached hereto), this Notice of Motion, and a good and sufficient surety bond in the amount of \$1,000.00, (the original of which is being filed with the Clerk of the above-entitled court on this day, and a copy of which bond is attached here- [4] to), and upon the records and files in this action.

At said time and place defendant will move the court for approval of said Removal Bond and for such other relief as is authorized by law or as may be just or necessary in this matter.

Dated: July 22, 1944.

M. PERELLI-MINETTI and H. L. MULLINER

By M. Perelli-Minetti

Attorneys for Defendant-Petitioner

Received a copy of this notice, a copy of said surety bond on removal in the amount of \$1,000.00, and a copy of said petition for removal this 22d day of July, 1944. Fred A. Wilson, Attorney for Plaintiffs.

[Endorsed]: Filed Jul. 22, 1944, 10:28 a. m. Harry L. Allison, Co. Clerk; by Helen E. Brooks, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [5]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

To the Honorable Superior Court of the State of California, in and for the County of San Bernardino:

Comes now Western Loan and Building Company, the defendant in the above entitled cause, and files, this, its petition for the removal of said cause, and the whole thereof, from the aforesaid superior court of the State of California in and for the County of San Bernardino where it is now pending, to the United States District Court in and for the Southern District of California, Central Division.

Your petitioner respectfully shows to this Honorable Court:

1. That said action was commenced in this Court by the plaintiffs against your petitioner by the filing of a complaint with the Clerk of said Court on or about the 16th day of June, 1944, and Summons was thereafter issued and served on your petitioner, the defendant in said suit, in a county other than San Bernardino County, on the 26th day of June, 1944; that said defendant is required by the laws of the State of California [6] to answer or otherwise plead to the complaint of plaintiffs on file in said action on or before July 26, 1944.

2. That it appears from the said complaint, and said suit is, of a civil nature, of which said District Court of the United States, to which your petitioner desires the same removed, is by law given original jurisdiction, and

wherein and whereby plaintiffs seek to recover against your petitioner a judgment in the sum of \$4,337.50 as in said complaint alleged.

3. That the matter or amount in controversy in said suit at the time of the commencement thereof exceeded and now exceeds the sum of \$3,000.00 exclusive of interest and costs.

4. That the controversy in this action, and every issue of fact or law therein, is wholly between citizens of different states in this, that before and at the time of the commencement thereof the said plaintiffs, Albert C. Arthur and H. B. Estes, were and ever since have been and now still are citizens and resident of the State of California: that your petitioner, the defendant herein, Western Loan and Building Company is now and was at the time of the commencement of this action a corporation organized and existing under and by virtue of the laws of the State of Utah, and was before and at the time of the commencement of this action and still is, a citizen of the State of Utah and of no other state.

5. That your petitioner herewith presents and files a good and sufficient bond in accordance with the statute in such cases made and provided, conditioned as the law directs, that it will within 30 days from the filing of this petition, enter and file in the United States District Court in and for the Southern District of California, Central Division, a certified copy of the record in this action, and for the payment to plaintiffs of all costs that may be awarded by said Court if the said District Court shall hold that this suit was wrongfully or improperly removed.

6. That your petitioner has duly served notice upon [7] the attorney of record for plaintiffs that it would at the

time and place specified in said notice, present to this Court this petition and bond for the removal of this cause to the United States District Court in and for the Southern District of California, Central Division, the original of which Notice is hereby attached and made a part hereof.

Wherefore, your petitioner prays this said Court that it proceed no further herein, except to order the removal of said cause to said District Court of the United States in and for the Southern District, Central Division, pursuant to the statute in such cases made and provided; that it accept and approve the bond herewith presented and filed, and direct a transcript of the record to be made and certified as provided by law; and that it make such other and further orders as may be necessary and meet and proper in the premises.

WESTERN LOAN AND BUILDING COMPANY

By C. J. Sumner

Its Vice-President, General Manager and
Attorney-in-Fact.

M. PERELLI-MINETTI

704 South Spring Street
Los Angeles 14, California

H. L. MULLINER

817 Continental Bank Building
Salt Lake City 1, Utah

By M. Perelli-Minetti

Attorneys for Petitioner.

[Verified.] [8]

[Endorsed]: Filed Jul. 22, 1944, 10:28 A. M. Harry
L. Allison, Co. Clerk; by Helen E. Brooks, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [9]

[Title of Superior Court and Cause.]

PACIFIC INDEMNITY COMPANY

[Crest]

Los Angeles

Pacific Finance Bldg.

San Francisco

100 Sansome Street

BOND ON REMOVAL

Know All Men by These Presents: That Pacific Indemnity Company, a corporation organized and doing business under and by virtue of the laws of the State of California, and duly licensed for the purpose of making, guaranteeing or becoming sole surety upon bonds or undertakings required or authorized by the laws of the said State, as surety, is held and firmly bound unto Albert C. Arthur and H. B. Estes, Plaintiffs in the above entitled action, their legal representatives, administrators or assigns, in the sum of One Thousand & No/100 - - - - Dollars (\$1000.00), lawful money of the United States of America, for the payment of which well and truly to be made, it binds itself, its successors and assigns, as the case may be, jointly and severally, firmly by these presents.

The Condition of the above undertaking is such that, Whereas, Western Loan and Building Company a corporation, has applied by petition to the Superior Court of the State of California, in and for the County of San Bernardino, for the removal of a certain cause therein pending wherein Albert C. Arthur and H. B. Estes are the plaintiffs, and Western Loan and Building Company, a corpora-

tion, is the defendant, to the District Court of the United States of America for the Southern District of California, Central Division, for further proceedings, on the grounds in said petition set forth, and that all further proceedings in said Superior Court be stayed.

Now, Therefore, if the above named Defendant, Western Loan and Building Company, a corporation, shall within thirty (30) days from and after the date of the filing of said petition or the order of removal, enter in said District Court of the United States of America a duly certified copy of the record in the above entitled action, and shall pay or cause to be paid all costs that may be awarded therein by the District Court of the United States, if such court shall hold that such action was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, Sealed and Dated this 21st day of July, 1944.

[Seal]

PACIFIC INDEMNITY COMPANY

By J. W. Maynard, Jr.

Attorney-in-Fact.

Executed in Quadruplicate.

The Premium charged for this bond is \$10.00 per annum.

State of California,
County of Los Angeles—ss.

On this 21st day of July in the year one thousand nine hundred and 44 before me, Atala M. Carter, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. W. Maynard, Jr., known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said J. W. Maynard, Jr. acknowledged to me that he subscribed the name of Pacific Indemnity Company, there-to as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal]

ATALA M. CARTER

Notary Public in and for Los Angeles County,
State of California.

My Commission Expires May 28, 1946.

The Foregoing Bond is hereby approved as to form and sufficiency of surety, this 7th day of August, 1944.

BENJAMIN F. WARMER
Judge of the Superior Court.

[Endorsed]: Filed Jul. 22, 1944, 10:28 a. m. Harry L. Allison, Co. Clerk; by Helen E. Brooks, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [10]

[Title of Superior Court and Cause.]

ANSWER

Comes now the Western Loan and Building Company and for its answer to plaintiffs' complaint admits, denies and alleges as follows:

I.

Answering Paragraph II of plaintiffs' complaint denies that on April 1, 1944 or on any other date that this defendant had or received the sum of \$4,337.50 or any other sum to or for the use or benefit of plaintiffs.

II.

Answering Paragraph IV of plaintiffs' complaint denies that there is now due, owing or unpaid from defendant to plaintiffs the sum of \$4,337.50 or any other sum together with interest thereon at the rate of 7% per annum from May 8, 1944 or from any other date or without interest. [11]

Wherefore, defendant prays that plaintiffs take nothing by their complaint, and

That defendant have and recover its costs incurred herein.

M. PERELLI-MINETTI and H. L. MULLINER

By M. Perelli-Minetti

Attorneys for Defendant

[Verified.]

[Endorsed]: Filed Jul. 26, 1944. 10:27 a. m. Harry L. Allison, Co. Clerk: by Edith Campbell, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [12]

[Title of Superior Court and Cause.]

DEMAND BY DEFENDANT WESTERN LOAN
AND BUILDING COMPANY FOR BILL OF
PARTICULARS

To Albert C. Arthur and H. B. Estes, plaintiffs, and to
Fred A. Wilson, their attorney:

Demand Is Hereby Made Upon You to furnish to the defendant, Western Loan and Building Company, within 10 days, a bill of particulars setting forth the exact nature of the claim or cause of action alleged in plaintiffs' complaint and the alleged receipt by this defendant of the sum of \$4,337.50, or any other sum, for the use or benefit of plaintiffs giving as a part thereof the times that such moneys were received by this defendant, at whose instance or request such moneys were paid to this defendant, or at whose instance or request such moneys were to be held for the use or benefit of plaintiffs, whether such instances or requests were in writing or oral (and if written that you furnish copies of each such request), the purpose for which such sums of money were delivered to defendant for the [13] use or benefit of plaintiffs, to whom, when and where the money was delivered.

Dated: July 25, 1944.

M. PERELLI-MINETTI and H. L. MULLINER

By M. Perelli-Minetti

Attorneys for Defendant

[Endorsed]: Filed Jul. 26, 1944, 10:27 a. m. Harry L. Allison, Co. Clerk: by Edith Campbell, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [14]

[Title of Superior Court and Cause.]

BILL OF PARTICULARS

To the defendant above named, and to M. Perelli-Minetti, Esq. and H. L. Mulliner, Esq., attorneys for said defendant:

You and each of you are hereby notified that pursuant to your demand therefor dated July 25th, 1944, the plaintiffs in the above entitled action do hereby present and deliver to you a Bill of Particulars setting forth the items of the account set forth in plaintiffs' complaint in the above entitled action, and do hereby set forth the nature of the cause of action alleged in said complaint, and do hereby allege and certify:

That the sum of \$4,337.50 was delivered by said plaintiffs to said defendant on April 1st, 1944, in the City of San Bernardino, California; that said sum was so delivered at the request of said defendant; that the defendant requested that said sum be delivered by plaintiffs to said defendant for the use and benefit of plaintiffs; and that said sum was so delivered by plaintiffs to defendant and was received by defendant, as aforesaid, as a deposit to apply on the purchase price of certain real [15] property in the event a contract for the purchase thereof was entered into between the plaintiffs and the said defendant.

Dated this 31st day of July, 1944.

ALBERT C. ARTHUR AND H. B. ESTES

By Albert C. Arthur

One of Said Plaintiffs.

FRED A. WILSON

Attorney for Said Plaintiffs.

[Verified.]

[Endorsed]: Filed Jul. 31, 1944, 4:40 p. m. Harry L. Allison, Co. Clerk; by Monte C. Smith, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [16]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL OF CAUSE TO
FEDERAL COURT

Upon reading the petition of the Western Loan and Building Company, the defendant in the above-entitled action, and upon examination of the bond filed herein, and good and sufficient surety having been offered by the surety in the premises, and the same being by me, the Judge of the above-entitled Superior Court, duly accepted, and it further appearing and being proved that notice of said petition and bond for removal has been duly given to the plaintiff in this action prior to the filing of same, as required by law:

Now, Therefore, it is hereby ordered that no further proceedings be had in this cause in this Court, and the removal of the same to the United States District Court in and for the Southern District of California, Central Division, be, and the same is hereby, allowed and ordered, in accordance with the aforesaid petition and the statutes of the United States in such case made and provided, and the Clerk of this Court is hereby directed and ordered to deliver [17] to the said defendant, upon its demand and the payment by it of the said Clerk's legal fees, a certified copy of the record of all proceedings in this cause.

Dated: August 7, 1944.

BENJAMIN F. WARNER

Judge of the Superior Court in and for the County of
San Bernardino

[Endorsed]: Filed Aug. 7, 1944, 4:03 p. m. Harry
L. Allison, Co. Clerk; by Edith Campbell, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [18]

State of California,
County of San Bernardino—ss.

I, Harry L. Allison, County Clerk and Ex-Officio Clerk of the Superior Court of the State of California, in and for San Bernardino County, do hereby certify the foregoing to be a full, true and correct copy of the original Complaint, Summons, Notice of motion and petition for order removing cause to Federal Court, Petition for Removal, Bond on Removal, Answer, Demand by defendant Western Loan and Building Company for bill of particulars, Bill of Particulars, and Order for removal of cause to Federal Court in the action *Albert C. Arthur and H. B. Estes vs. Western Loan and Building Company*, a corporation, No. 51223 - - - - - on file in my office, and that I have fully compared said copy with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 11th day of August, 1944.

[Seal]

HARRY L. ALLISON

County Clerk and Ex-Officio Clerk of the Superior Court
of the State of California, in and for the County of
San Bernardino,

By Helen E. Brooks,
Deputy.

Copy received

Doc. TS & C-1.

[Endorsed]: Filed Aug. 17, 1944. [19]

United States District Court
Southern District of California

Central Division

No. 3815-PH Civil

ALBERT C. ARTHUR and H. B. ESTES,

Plaintiffs,

vs.

WESTERN LOAN AND BUILDING COMPANY,
a corporation,

Defendant.

NOTICE OF ORDER FOR REMOVAL OF CAUSE
TO FEDERAL COURT

and

NOTICE OF FILING TRANSCRIPT OF RECORD
IN THE UNITED STATES DISTRICT COURT

To Albert C. Arthur and H. B. Estes, plaintiffs and to
Their Attorney, Fred A. Wilson:

You, and Each of You, Please Take Notice:

1. That on August 7, 1944 the Superior Court of the State of California in and for the County of San Bernardino in the action entitled "Albert C. Arthur and H. B. Estes, plaintiffs vs. Western Loan and Building Company, a corporation, defendant" (San Bernardino Superior Court action No. 51223), the Honorable Benjamin F. Warner, Judge presiding made its order for removal ordering that no further proceedings be had in said action in said Superior Court and removing the same to the

United States District Court in and for the Southern District of California, Central Division; and that attached hereto is a copy of said order which was duly entered thereafter on August 7, 1944.

2. That thereafter in accordance with the provisions of [20] said order for removal the clerk of said Superior Court and after payment to said clerk of all legal fees prepared a certified copy of record of all proceedings and transcript in said action consisting of: Complaint, Summons, Notice of Motion and Petition for Order Removing Cause to Federal Court, Petition for Removal, Bond on Removal, Answer, Demand by Defendant, Western Loan and Building Company for Bill of Particulars, Bill of Particulars, Order for Removal of Cause to Federal Court in action Albert C. Arthur and H. B. Estes vs. Western Loan and Building Company, a corporation, No. 51223.

You are further notified that said certified copy of record of all proceedings and transcript was filed in the United States District Court, Southern District of California, Central Division on August 17, 1944.

Dated: August 22, 1944.

M. PERELLI-MINETTI and H. L. MULLINER

By M. Perelli-Minetti

Attorneys for Defendant

[Note: Order for Removal of Cause to Federal Court attached hereto is the same as the one found at page 17 of the Certified Record so is not repeated at this point.]

[Endorsed]: Filed Aug. 23, 1944. [21]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO AMEND
ANSWER

To the Plaintiffs, Albert C. Arthur and H. B. Estes:
and to Fred A. Wilson, Their Attorney:

You. and Each of You, Please Take Notice that the above entitled court sitting in Courtroom No. 4, the Honorable Peirson M. Hall, Judge presiding, will on Tuesday, December 26, 1944 at the hour of 10:00 o'clock A. M. or thereafter hear defendant's motion for leave to amend answer.

Defendant's motion will be based upon the files and records in this case.

Dated: December 15, 1944.

H. L. MULLINER and M. PERELLI-MINETTI

By M. Perelli-Minetti

Attorneys for Defendant

[Endorsed]: Filed Dec. 15, 1944. [22]

[Minutes Tuesday, December 26, 1944.]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for hearing on motion of defendant for leave to amend answer, pursuant to notice filed December 15, 1944:

The Court states that in view of the fact that there is no appearance of counsel, and after an examination of the file, including the complaint, the pre-trial briefs, the original answer, and the pre-trial statements and proposed amended answer, it feels that Judge Hall would even permit such an amendment at the time of the trial so that the permission to file the amended answer is hereby granted. [23]

[Title of District Court and Cause.]

NOTICE ON MOTION TO FILE AMENDED
ANSWER

To the Plaintiffs, Albert C. Arthur and H. B. Estes, and
to Fred A. Wilson, Their Attorney:

You, and Each of You, are Hereby Notified that the motion of defendants to file an amended answer was granted by the above-entitled court, sitting in Courtroom No. 4 and that attached hereto and made a part hereof is a copy of the amended answer filed pursuant to the granting of said motion.

Dated: December 27, 1944.

H. L. MULLINER & M. PERELLI-MINETTI

By M. Perelli-Minetti

Attorneys for Defendant

[Endorsed]: Filed Dec. 29, 1944. [24]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the Western Loan and Building Company and for its *answer the* plaintiffs' complaint admits, denies and alleges as follows:

I.

Answering Paragraph II of plaintiffs' complaint denies that on April 1, 1944 or on any other date that this defendant had or received the sum of \$4,337.50 or any other sum to or for the use or benefit of plaintiffs.

II.

Answering Paragraph III of plaintiffs' complaint defendant admits that plaintiffs demanded the sum of \$4,337.50, but in this respect defendant alleges that the demand was received by defendant about May 9, 1944 and that it was made in connection with the request by plaintiffs of the return to them of said sum previously paid by them and accepted by defendant as a deposit and [25] part payment on the purchase price of the sale by defendant to plaintiffs of an apartment house.

III.

Answering Paragraph IV of plaintiffs' complaint denies that there is now due, owing or unpaid from defendant to plaintiffs the sum of \$4,337.50 or any other sum together with interest thereon at the rate of 7% per annum from May 8, 1944 or from any other date or without interest.

As a Second, Separate and Further Defense, Defendant Alleges:

I.

That on April 1, 1944 and for many years prior thereto the defendant, Western Loan and Building Company, was the owner of and in possession of the Norman Manor and Norman Manor Annex Apartments located at 480-98 17th Street and 1745 E. Street, San Bernardino, California.

II.

That on April 1, 1944 the plaintiffs, Albert C. Arthur and H. B. Estes, offered in writing to purchase from defendant said apartments: that attached hereto marked Exhibit "A" and made a part hereof is a copy of said written offer to purchase.

III.

That at the same time that plaintiffs offered to purchase said apartments and as a deposit and a part payment plaintiffs paid to the defendant the sum of \$4,337.50.

IV.

That said offer to purchase provided, among other things, that it would "remain open and irrevocable to and including May 1st, 1944"; that on or about April 24, 1944 and while said offer remained open defendant verbally accepted said offer to purchase and agreed to sell and did sell to the plaintiffs said apartments [26] upon the terms and conditions set forth in said offer to purchase.

V.

That at all times subsequent to April 24, 1944 defendant has been willing and able and the defendant is now will-

ing and able to comply in every respect with the terms and conditions set forth in the offer to purchase, but the plaintiffs have at all times since about May 9, 1944 failed and refused and still fail and refuse to carry out the terms of said sale.

Wherefore, defendant prays that plaintiffs take nothing by their complaint, and

That defendant have and recover its costs incurred herein.

H. L. MULLINER and M. PERELLI-MINETTI

By M. Perelli-Minetti

Attorneys for Defendant

[Verified.]

[Note: Exhibit A attached hereto is the same as plaintiff's Exhibit No. 6, set forth at page 69.]

[Endorsed]: Filed Dec. 29, 1944. [27]

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

Come now the plaintiffs above named and waive a jury and a trial by jury in the above entitled cause.

Dated this 2nd day of January, 1945.

FRED A. WILSON

Attorney for Plaintiffs.

[Endorsed]: Filed Jan. 4, 1945. [28]

[Minutes: Thursday, January 11, 1945.]

Present: The Honorable: Peirson M. Hall, District Judge.

This cause coming on for further trial; Fred A. Wilson, Esq., appearing for the plaintiffs; M. Perelli-Minetti and H. L. Mulliner, Esqs., appearing for the defendant; H. P. Fursdon, Court Reporter, being present and reporting the proceedings:

Witness Sullivan is recalled and testifies further in behalf of the defendant, and Defendant's Exhibits G and H are offered and admitted into evidence, following which Defendant's Exhibits I and J are offered and marked for identification. Later, Defendant's Exhibit I for identification is ordered admitted into evidence.

Witness Carran is recalled and testifies further in behalf of the defendant and Defendant's Exhibit K is offered and admitted into evidence. The defendant rests.

Witness Estes is recalled in rebuttal in behalf of the plaintiffs.

Witness Arthur is recalled in rebuttal and testifies further.

At 11:55 A. M. court recesses to 1:30 P. M. Court reconvenes at 2 P. M.; all present as before.

Witness Arthur resumes the stand and testifies further on surrebuttal for the plaintiffs. The plaintiff rests.

Witness Carran is recalled and testifies on sur-rebuttal for the defendant. Witness Sullivan is recalled and testifies on sur-rebuttal for the defendant. The defendant rests.

Attorney Perelli-Minetti argues to the Court for the defendant. [29]

Attorney Wilson argues to the Court in behalf of the plaintiffs.

The Court orders judgment for the plaintiffs.

Attorney Mulliner moves to re-open the case for the purpose of the introduction of a letter and counsel for plaintiffs interposing no objection, Defendant's Exhibit I-1 is offered and admitted into evidence.

The Court after due consideration of the evidence orders judgment in favor of the plaintiffs, counsel for the plaintiffs to prepare formal Findings of Fact and Conclusions of Law, and Judgment pursuant thereto, and counsel for the defendant to have 10 days after service of copy of Findings to file objections thereto. [30]



[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court sitting without a jury on the 10th day of January, 1945, the plaintiffs appearing in person and by their attorney, Fred. A. Wilson, Esq., and the defendant appearing by its attorneys, H. L. Mulliner, Esq. and M. Perelli-Minetti, Esq.; whereupon evidence was duly introduced by and on behalf of the respective parties and the cause submitted to the Court for its decision and judgment.

Findings of Fact

From the evidence introduced, the Court hereby finds:

(a) That the defendant, Western Loan and Building Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Utah;

(b) That on April 1st, 1944, and for many years prior [31] thereto the defendant was and still is the owner and in possession of the Norman Manor and Norman Manor Annex Apartments, located at 480-498 Seventeenth Street and 1745 "E" Street, in the City of San Bernardino, California;

(c) That on April 1st, 1944, the plaintiffs, in writing, offered to purchase said Apartments, including the furniture and furnishings thereof, from the defendant, a copy of which offer is marked Exhibit "A" and attached to defendant's amended answer herein;

(d) That contemporaneously with the delivery of said offer to defendant the plaintiffs deposited with the defendant the sum of \$4,337.50;

(e) That said offer provided that said sum so deposited should be retained by defendant if, after acceptance of said offer, the sale of said Apartments to plaintiffs was not completed by reason of any fault or failure of plaintiffs, or if said offer was withdrawn prior to May 1st, 1944;

(f) That said offer also provided that said offer should remain open and irrevocable to and including May 1st, 1944, unless sooner rejected or accepted;

(g) That plaintiffs on May 8th, 1944, by telegram and by letter withdrew and revoked said offer, and demanded return to them by defendant of said sum of \$4,337.50 so deposited by plaintiffs, as aforesaid;

(h) That the defendant on May 9th, 1944, received notice and had knowledge of the aforesaid withdrawal and revocation of said offer by plaintiffs, and of plaintiffs' demand for the return of said sum;

(i) That the defendant did not, prior to receiving notice and obtaining knowledge of plaintiffs' withdrawal and revocation, accept said offer;

(j) That the defendant has not returned said sum of [32] \$4,337.50, or any part thereof, to plaintiffs;

(k) That it is not true that said sum, or any part thereof, was paid by plaintiffs to defendant as part payment of the purchase price of said Apartments, or as payment in whole or in part for any property whatsoever;

(l) That it is not true that on or about April 28th, 1944, or at any other time while said offer remained open, the defendant verbally or otherwise accepted said offer, or agreed to sell or did sell to plaintiffs the said Apartments, or any property whatsoever;

(m) That it is not true that the defendant at any time prior to receiving notice and obtaining knowledge of the withdrawal and revocation of said offer, as aforesaid, has been willing and able to comply with the terms and conditions of said offer.

Conclusions of Law

From the foregoing facts, the Court deduces the following Conclusions of Law:

(1) That on the 1st day of April, 1944, the said defendant had received the sum of \$4,337.50 to and for the use and benefit of plaintiffs, subject to the provisions of the offer aforesaid;

(2) That on May 8th, 1944, the plaintiffs withdrew and revoked said offer, and demanded return of said sum to plaintiffs;

(3) That defendant did not, prior to receiving notice and obtaining knowledge of such withdrawal and revocation thereof by plaintiffs, accept said offer;

(4) That defendant has not returned the said sum, or any portion thereof, to plaintiffs;

(5) That plaintiffs are entitled to judgment against [33] the defendant for the sum of \$4,337.50, together with interest thereon at the rate of seven per cent. per annum from the 9th day of May, 1944, and for plaintiffs' costs incurred herein.

Let judgment be entered accordingly.

Dated this 27 day of January, 1945.

PEIRSON M. HALL,

Judge. [34]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 27, 1945. [35]

[Title of District Court and Cause.]

NOTICE OF MOTION

- 1) To vacate Findings of Fact and Conclusions of Law heretofore signed, and
- 2) of objections to plaintiffs' proposed Findings and Conclusions and Motion to Amend same

To Albert C. Arthur and H. B. Estes, Plaintiffs and to
Fred A. Wilson, Esq., Their Attorney:

You Will Please Take Notice that on Monday, February 19, 1945 at 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, in Courtroom No. 4 of the above entitled court, the Honorable Peirson M. Hall, Judge Presiding, located in the Post Office and Court House Building in the City of Los Angeles, California, that the defendant, Western Loan and Building Company, will move the court:

(1) To vacate the Findings of Fact and Conclusions of Law heretofore signed and that the court make its order amending Findings of Fact and Conclusions of Law proposed by plaintiffs.

The motion to vacate the Findings of Fact and Conclusions of Law heretofore signed will be based upon the ground that the above entitled court granted to defendant, all as more particularly [36] shown in its Minute Order made and entered January 11, 1945 in Minute Book 44 at Pages 191 and 192, the right to file objections thereto within ten days after service of a copy of the same upon defendant and that through inadvertence the above entitled court signed the Findings prior to the expiration of the ten day period.

(2) The motion to amend the Findings of Fact and Conclusions of Law will be based upon the ground that the Findings of Fact, as proposed by plaintiffs, fail to contain Findings of Fact upon the three material issues of fact which were joined. These three material issues follow:

- (A) Did Mr. Carron, in a telephone conversation on April 24, 1944, state to Mr. Arthur that the deal had been approved by the Salt Lake office of defendant company and then arrange for taking the inventory of the furnishings?
- (B) Did Mr. Sullivan, by telephone, May 8, 1944, inform Mr. Arthur of the acceptance of the deal by the defendant and of the receipt by Mr. Sullivan of the papers to close the deal, and was his call before or after the receipt by the company of plaintiffs' night telegrams and letters withdrawing their offer?
- (C) Considering the offer and the previous transactions with plaintiffs and the escrow instructions and the statement in plaintiffs' bill of particulars concerning the \$4,337.50 deposit, would this have been applied as a payment if the deal had been closed, and was it so intended by the parties hereto?

Defendant respectfully contends that it is entitled to findings on these material issues of fact. Defendant also respectfully tenders proposed findings covering these issues, without [37] waiving its right to object to the conclusions or the decision of the Court herein.

By reason of plaintiffs' failure to include in their proposed Findings of Fact findings upon the foregoing is-

sues, defendant will move for an amendment to the proposed findings submitted by plaintiffs in the following respects:

(a) In subdivision "a" of plaintiffs' proposed findings by deleting the word "corporation" appearing at line 29, page 1 and substituting in lieu thereof "Building and Loan Association" and by adding to said subdivision "a" after the word "Utah" at line 31, page 1 the following words "and authorized to transact business in California".

(b) By omitting the findings contained in subdivision "b" beginning at line 32, page 1 through line 4, page 2 of plaintiffs' proposed findings.

(c) By reason of the deletion of subdivision "b", subdivision "c" appearing at lines 5 through 9, page 2 of plaintiffs' proposed findings has been designated subdivision "b" in the findings attached hereto.

(d) By reason of the deletion of subdivision "b", subdivision "d" appearing at lines 10 through 12, page 2 of plaintiffs' proposed findings has been designated subdivision "c" in the findings attached hereto.

(e) In subdivision "e" of plaintiffs' proposed findings by inserting after the word "defendant" appearing at line 14, page 2 the following words "as liquidated damages as therein recited". This subdivision, as amended, has been designated subdivision "d" in the findings attached hereto.

(f) In subdivision "f" of plaintiffs' proposed findings by adding after the word "accepted" appearing at line 20, page 2 the words "and that the closing date of the sale

was May 15, 1944". This subdivision, as amended, has been designated subdivision "e" in the [38] findings attached hereto.

(g) By deleting subdivision "g" appearing at lines 21 through 24, page 2 of plaintiffs' proposed findings and by substituting in lieu thereof an entirely new subdivision "g" designated subdivision "f" set out in the proposed findings attached hereto beginning at line 19, page 2 through line 7, page 3.

(h) By deleting subdivision "h" appearing at lines 25 through 28, page 2 of plaintiffs' proposed findings and by substituting in lieu thereof an entirely new subdivision "h" designated subdivision "g" set out in the proposed findings attached hereto beginning at line 8, page 2 through line 15, page 2.

(i) By deleting subdivision "i" appearing at lines 29 through 31, page 2 of plaintiffs' proposed findings and by substituting in lieu thereof an entirely new subdivision "i" designated subdivision "h" set out in the proposed findings attached hereto beginning at line 16, page 3 through line 5, page 4.

(j) By reason of the deletion of subdivision "b", subdivision "j" appearing at line 32, page 2 through line 1, page 3 of plaintiffs' proposed findings has been designated subdivision "i" in the findings attached hereto.

(k) By deleting subdivision "k" appearing at lines 2 through 5, page 3 of plaintiffs' proposed findings and by substituting in lieu thereof an entirely new subdivision

“k” designated subdivision “j” set out in the proposed findings attached hereto beginning at line 8, page 4 through line 14, page 4.

(l) By deleting subdivision “l” appearing at lines 6 through 10, page 3 of plaintiffs’ proposed findings and by substituting in lieu thereof an entirely new subdivision “l” designated subdivision “k” set out in the proposed findings attached hereto beginning at line 15, page 4 through line 19, page 4.

(m) By deleting subdivision “m” appearing at lines 11 through 15, page 3 of plaintiffs’ proposed findings and by substituting in lieu thereof an entirely new subdivision “m” designated subdivision “l” set out in the proposed findings attached hereto beginning at line 20, page 4 through line 22, page 4.

(n) That in the third division of the Conclusions of Law after the word “offer” at line 29, page 3 of plaintiffs’ proposed findings there be added the words “as required by law”.

Said motion will also be made and based upon this notice and upon the pleadings, papers, records, and files in this action.

Dated this 2nd day of February, 1945.

H. L. MULLINER & M. PERELLI-MINETTI

By M. PERELLI-MINETTI

Attorneys for Defendant [40]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court sitting without a jury on the 10th day of January, 1945, the plaintiffs appearing in person and by their attorney, Fred A. Wilson, Esq., and the defendant appearing by its attorneys, H. L. Mulliner, Esq. and M. Perelli-Minetti, Esq.; whereupon evidence was duly introduced by and on behalf of the respective parties and the cause submitted to the Court for its decision and judgment.

Findings of Fact

From the evidence introduced, the Court hereby finds:

(a) That the defendant, Western Loan and Building Company, is and at all times herein mentioned was a Building and Loan Association organized and existing under and by virtue of the laws of the State of Utah, and authorized to transact business in California. [41]

(b) That on April 1st, 1944, the plaintiffs, in writing, offered to purchase said Apartments, including the furniture and furnishings thereof, from the defendant, a copy of which offer is marked Exhibit "A" and attached to defendant's amended answer herein;

(c) That contemporaneously with the delivery of said offer to defendant the plaintiffs deposited with the defendant the sum of \$4,337.50;

(d) That said offer provided that said sum so deposited should be retained by defendant as liquidated damages as

therein recited if, after acceptance of said offer, the sale of said Apartments to plaintiffs was not completed by reason of any fault or failure of plaintiffs, or if said offer was withdrawn prior to May 1st, 1944;

(e) That said offer also provided that said offer should remain open and irrevocable to and including May 1st, 1944, unless sooner rejected or accepted, and that the closing date of the sale was May 15, 1944;

(f) About April 18, 1944. appraisal of the property involved was made by an appraiser, approved by the building and loan commissioner of the State of California, and on April 21, 1944, approval of the sale by a California director of the company. Mr. Scudder, was addressed to the Salt Lake office of the company.

By letter dated April 22, 1944, C. J. Sumner, then acting as General Manager and Executive Vice-President of defendant company, addressed to P. E. Sullivan, Sales Manager of defendant company for the State of California, authorizing approval of the sale (defendant's Exhibit "I"). This letter was received at the Los Angeles office of defendant company April 24, 1944. On that date, and while Mr. Sullivan was at that office, Mr. James Carron, the Sales Manager of defendant company at the Los Angeles office, called Albert C. Arthur, one of the plaintiffs, and told him on the [42] telephone that the defendant had approved the sale, and he then arranged with Mr. Arthur for the taking of an inventory of the furnishings in the said property commencing the following day (Ex. "F").

The inventory was taken in the property April 25 and 26, 1944, the two plaintiffs and Mr. Carron participating. The sheets listing the individual items so inventoried were signed by the plaintiffs, but not by anyone representing defendant (Ex. "C").

(g) At the time of taking the inventory, it was stated to plaintiffs by Mr. Carron that the inventory would have to be recapped and totaled and sent to the Salt Lake office of defendant company, and that the papers to close the transaction would come from the Salt Lake office.

The inventory was recapped and typed (Ex. "D") at the Los Angeles office of defendant company and sent to the Salt Lake office.

(h) The deed, trust deed, note, bill of sale, and chattel mortgage required to close the transaction, executed in so far as required by defendant, were forwarded by its Salt Lake office to its Los Angeles office May 5, 1944 and received there Monday morning May 8, 1944. On said date Mr. Sullivan called Mr. Arthur, one of the plaintiffs, and stated to him that the papers had been received to close the transaction, and that defendant was ready to close. Mr. Arthur then informed Mr. Sullivan that plaintiffs had decided not to go through with the deal.

Under date of May 8, 1944, plaintiffs caused to be prepared and wired to defendant's Salt Lake and to its Los Angeles office, by Western Union, night letters, stating that the offer to purchase was withdrawn and that they demanded return of the \$4,337.50 here involved. The wire to Los Angeles was received there and telephoned by the

telegraph company to Mr. Sullivan the morning of May 9, 1944 at 9:21 a. m., and delivered later by mail. The wire to Salt Lake was received May 9, 1944. [43]

Letters to each of said offices of defendant company were also prepared under date of May 8, 1944 and forwarded. The letter addressed to the Los Angeles office was received May 10, 1944 and the letter to the Salt Lake office was received on May 11, 1944.

(i) That the defendant has not returned said sum of \$4,337.50, or any part thereof, to plaintiffs.

(j) From the evidence it appears, and the Court finds from the offer and from the previous transactions with the plaintiff Estes and from the allegation in plaintiff's bill of particulars and the escrow instructions, that if the transaction had been closed, the \$4,337.50 would have been applied upon the purchase price contained in the offer, and that this was so intended by the parties hereto.

(k) That the foregoing Findings of Fact do not constitute an acceptance by defendant of the offer by plaintiffs in a legal, proper or authorized manner, or so as to constitute a binding contract between the parties hereto, or so as to entitle defendant to retain the sum of \$4,337.50 here involved.

(l) That defendant was, on or about May 8, 1944, willing to close said transaction, and has ever since been ready and willing to complete the same.

Conclusions of Law

From the foregoing facts, the Court deduces the following Conclusions of Law:

(1) That on the 1st day of April, 1944, the said defendant had received the sum of \$4,337.50 to and for the use and benefit of plaintiffs, subject to the provisions of the offer aforesaid.

(2) That on May 8th, 1944, the plaintiffs withdrew and revoked said offer, and demanded return of said sum to plaintiffs.

(3) That defendant did not, prior to receiving notice [44] and obtaining knowledge of such withdrawal and revocation thereof by plaintiffs, accept said offer as required by law.

(4) That defendant has not returned the said sum, or any portion thereof, to plaintiffs.

(5) That plaintiffs are entitled to judgment against the defendant for the sum of \$4,337.50, together with interest thereon at the rate of seven per cent per annum from the 9th day of May, 1944, and for plaintiffs' costs incurred herein.

Let judgment be entered accordingly.

Dated this day of, 1945.

.....
Judge

[Endorsed]: Filed Feb. 2, 1945. [45]

[Title of District Court and Cause.]

NOTICE OF INTENTION OF THE DEFENDANT
TO MOVE FOR NEW TRIAL

To the Clerk of the Above-Named Court; to Albert C.
Arthur and H. B. Estes, Plaintiffs and to Fred A.
Wilson, Esq., Their Attorney:

You, and Each of You, Will Please Take Notice that
on Monday, February 17, 1945 at 10:00 o'clock A. M. of
said day, or as soon thereafter as counsel can be heard, in
Courtroom No. 4 of the above entitled court, the Honor-
able Peirson M. Hall, Judge Presiding, located in the
Post Office and Court House Building in the City of Los
Angeles, California, that the defendant, Western Loan
and Building Company, intends to move the court to
vacate and set aside the judgment of the court heretofore
rendered in favor of the plaintiffs and against the defend-
ant, Western Loan and Building Company, in the above
entitled matter, and to grant a new trial on said action
on the following grounds:

1. Insufficiency of the evidence to justify the de-
cision, [46] and that the decision is against the law.
2. Error in law occurring at the trial.

Said motion will be made upon the minutes of the court,
papers and files in this action, the judgments rendered, and
this notice of motion.

Dated: February 2, 1945.

H. L. MULLINER & M. PERELLI-MINETTI
By M. PERELLI-MINETTI
Attorneys for Defendant

Points and Authorities

1. The evidence disclosed without any direct conflict that the plaintiffs were advised on two separate occasions by telephone that the defendant, Western Loan and Building Company, through its Salt Lake office, had accepted the offer to purchase. The first occasion occurred on April 24, 1944 when Mr. Carron telephoned from Los Angeles to Mr. Arthur at San Bernardino. The second occasion occurred on May 8, 1944 when Mr. Sullivan telephoned from Los Angeles to Mr. Arthur at San Bernardino. Both of these telephone calls took place before defendant had received any information of any kind that the plaintiffs, or either of the plaintiffs, had revoked or withdrawn or attempted to revoke or withdraw the written offer to purchase.

2. Either of the verbal acceptances so transmitted by Messrs. Carron and Sullivan to plaintiffs was sufficient under the law to transform the written offer to purchase into a binding contract.

Laffey v. Kaufman, 134 Cal. 391 (66 Pac. 494)

Walbridge v. Richards, 212 Cal. 408 (298 Pac. 985)

Harper v. Goldschmidt, 156 Cal. 245 (104 Pac. 451) [47]

3. The offer to purchase did not expire May 1, 1944. The offer to purchase was "irrevocable to and including May 1st 1944" and the \$4,337.50 was to be retained by defendant as liquidated damages if withdrawn prior to May 1, 1944. The offer to purchase remained open, although no longer irrevocable, until May 15, 1944. Such

is the unambiguous language of the offer and such is the interpretation placed upon the offer by the plaintiffs.

4. Assuming (but not conceding) that the offer to purchase was originally phrased and intended to expire on May 1, 1944, nevertheless plaintiffs under the circumstances in this case and by their acts waived the time limit. This waiver consisted, in part, of the repeated requests by each of the plaintiffs to the defendant to hurry along the acceptance: the taking of the inventory of furniture, furnishings and equipment in San Bernardino just prior to May 1, 1944—or to be exact on the 25th and 26th of April, which was participated in by each of the plaintiffs and which in turn necessitated a recapping of all of the items contained in the inventory in defendant's Los Angeles office and then a forwarding of the recapping to Salt Lake to permit Salt Lake to draft and execute the deed, trust deed, bill of sale, chattel mortgage and other instruments and the mailing of those instruments to Los Angeles for delivery to plaintiffs in San Bernardino and all of this activity at a time when plaintiffs had knowledge that Mr. Carron (in charge of the Los Angeles sales office of defendant) was leaving the defendant's employ as of April 30, 1944 (Sunday).

Williston on Contracts, Rv'd. Ed., Vol. 1, Sec. 53, page 151 in the following language recognizes this to be the rule:

“ . . . Not infrequently an offeror who has imposed a limit of time in his offer does not care to insist upon it and by further negotiations may indicate a continued willingness to stand by the [48] terms of his offer. Any such manifest action of continued willingness is in effect a new offer, which may be accepted and if accepted will ripen into a contract.”

5. The revocation or withdrawal by plaintiffs of their offer, or their attempts in that direction, were ineffectual until actual notice thereof was received by defendant.

125 ALR 989, 990

200 Cal. 222

The telegrams and letters of revocation from plaintiffs were received by defendant May 9, 1944. They cannot therefore prevail against the verbal acceptances communicated by Mr. Carron on April 24, 1944 and by Mr. Sullivan May 8, 1944.

Dated this 2nd day of February, 1945.

H. L. MULLINER & M. PERELLI-MINETTI
Attorneys for Defendant

[Endorsed]: Filed Feb. 2, 1945. [49]

[Minutes: Monday, February 19, 1945.]

Present: The Honorable: Peirson M. Hall, District Judge.

This cause coming on for hearing on motion of the defendant to vacate Findings of Fact and Conclusions of Law, heretofore signed by the Court, and hearing on objections to plaintiffs' proposed Findings of Fact and Conclusions of Law, and motion to amend same, pursuant to notice filed February 2, 1945; Fred A. Wilson, Esq., appearing for the plaintiffs; M. Perelli-Minetti, Esq., appearing for the defendant; John Q. Bybee, Court Reporter, being present and reporting the proceedings; the case is called at 10 A. M. and continued to 2 P. M. Court reconvenes herein at 2 P. M.; all present as before.

The Court signs judgment pursuant to Findings dated and signed as of January 27, 1945, and said judgment is dated as of January 27, 1945, which is ordered filed and entered in the Civil Order Book.

Attorney Perelli-Minetti now argues in support of motion to vacate Findings of Fact and Conclusions of Law, and motion for a new trial. Attorney Wilson argues in opposition.

The Court orders said motions to vacate Findings and for a new trial denied, and signs Judgment pursuant to findings and orders same filed and entered in the Civil Order Book. [50]

United States District Court
Southern District of California
Central Division
No. 3815-PH-Civil

ALBERT C. ARTHUR and H. B. ESTES,
Plaintiffs,

vs.

WESTERN LOAN AND BUILDING COMPANY, a
corporation,
Defendant.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on the 10th day of January, 1945, the plaintiffs appearing in person and by their attorney, Fred. A. Wilson, Esq., and the defendant appearing by its attorneys, H. L. Mulliner, Esq. and M. Perelli-Minetti, Esq.; whereupon evidence was duly introduced by and on behalf of the respective parties and the cause submitted to the Court for its decision and judgment.

Thereafter the Court duly made and entered its Findings of Fact and Conclusions of Law:

Now. Therefore, in Accordance With the Law and the Evidence and the Decision Aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

(1) That on the 1st day of April, 1944, the said defendant had and received the sum of \$4,337.50 to and for the use and benefit of plaintiffs, subject to the provisions of [51] the offer referred to in said decision;

(2) That on May 8th, 1944, the plaintiffs withdrew and revoked the said offer referred to in said decision and demanded the return of said sum to plaintiffs;

(3) That defendant did not, prior to receiving notice and obtaining knowledge of such withdrawal and revocation thereof by plaintiffs, accept said offer;

(4) That defendant has not returned the said sum, or any portion thereof, to plaintiffs;

(5) That plaintiffs have and recover judgment against defendant for the sum of \$4,337.50, together with interest thereon at the rate of seven per cent. per annum from the 9th day of May, 1944, and for plaintiffs' costs and disbursements herein, duly taxed in the sum of \$.....

Dated this 27 day of January, 1945.

PEIRSON M. HALL

Judge.

Judgment entered Feb. 19, 1945. Docketed Feb. 19, 1945, C. O. Book 30, page 778. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Feb. 19, 1945. [52]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDER DENYING
MOTION FOR NEW TRIAL.

To the defendant above named, and to M. Perelli-Minetti,
Esq. and H. L. Mulliner, Esq., attorneys for said de-
fendant:

You and each of you will please take notice that on the
19th day of February, 1945, the above entitled District
Court duly made and entered its order denying the motion
of the defendant above named for a new trial of said
cause.

Dated this 24th day of February, 1945.

FRED A. WILSON
Attorney for Plaintiffs.

[Endorsed]: Filed Feb. 26, 1945. [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

To the Clerk of the Above Entitled Court and to Albert
C. Arthur and H. B. Estes, plaintiffs and to Fred A.
Wilson, their attorney:

Notice Is Hereby Given that the Western Loan and
Building Company, a corporation, the defendant above
named, hereby appeals to the United States Circuit Court

of Appeals for the Ninth Circuit from the following judgment and orders:

1. The judgment filed, entered and docketed on February 19, 1945 in Civil Orders Book 30, page 778 in favor of plaintiffs and against defendant.

2. The order of the above entitled court made on February 19, 1945 and duly entered on February 19, 1945 in Volume 44 at pages 896 and 897 of the Minute Book denying the motion of the defendant for a new trial, and

3. The order of the above entitled court made on [54] February 19, 1945 and duly entered on February 19, 1945 in Volume 44 at pages 896 and 897 of the Minute Book denying the motions of the defendant entitled "Notice of Motion" (1) To Vacate Findings of Fact and Conclusions of Law heretofore signed, and (2) of Objections to Plaintiffs' Proposed Findings and Conclusions and Motion to Amend same.

H. L. MULLINER & M. PERELLI-MINETTI

By M. PERELLI-MINETTI

Attorneys for Appellant, Western Loan and Building Company [55]

[Affidavit of Service by Mail.]

[Endorsed]: Filed & mailed copy to Fred A. Wilson, atty. for plaintiffs, May 18, 1945. [56]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Western Loan and Building Company, a Corporation, Defendant in the above entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment in the above matter entered February 19, 1945, in favor of the Plaintiffs and against the Defendant.

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Co., a Corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Co. has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate seal to be affixed hereto, this 18th day of May, 1945.

NATIONAL AUTOMOBILE AND CASUALTY
INSURANCE CO.

(Seal)

By LLOYD H. JOHNSTON,
Attorney-in-Fact

Examined and Recommended for Approval as provided in Rule 13.

M. PERELLI-MINETTI

Attorney.

State of California,

County of Los Angeles—ss.

On this 18th day of May, in the year 1945, before me, Ruth E. Harris a Notary Public in and for said County and State, personally appeared Lloyd H. Johnston, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the National Automobile and Casualty Insurance Co., and acknowledged to me that he subscribed the name of the National Automobile and Casualty Insurance Co., thereto as principal, and his own name as Attorney-in-Fact.

(Seal)

RUTH E. HARRIS

Notary Public in and for Said County and State.

[Endorsed]: Filed May 18, 1945. [57]

[Title of District Court and Cause.]

ORDER TRANSFERRING ORIGINAL PAPERS
AND EXHIBITS TO THE CLERK OF THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT

Upon reading the affidavit of M. Perelli-Minetti, one of the attorneys for the appellant, Western Loan and Building Company, and good cause appearing therefor:

It Is Hereby Ordered that the clerk of the above entitled court is hereby directed to transmit forthwith to the

clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, all original papers and exhibits in the above entitled action, so that the same may be used for printing the record on appeal in this action and that thereafter and after the determination of the appeal in this action that the same be returned to the clerk of this court.

Dated: This 13 day of June, 1945.

PEIRSON M. HALL

Judge

[Endorsed]: Filed Jun. 13, 1945. [64]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 64 contain full, true and correct copies of Complaint; Notice of Motion and Petition for Order Removing Cause to Federal Court; Petition for Removal; Bond on Removal; Answer; Demand by Defendant for Bill of Particulars; Bill of Particulars; Order for Removal of Cause to Federal Court; Certificate of Clerk of Superior Court; Notice of Order for Removal of Cause to Federal Court and Notice of Filing Transcript of Record in the United States District Court; Notice of Motion for Leave to Amend Answer; Minute

Order Entered December 26, 1944; Notice of Motion to File Amended Answer; Amended Answer, except Exhibit A; Waiver of Jury Trial; Minute Order Entered January 11, 1945; Findings of Fact and Conclusions of Law; Notice of Motion to Vacate Findings of Fact and Conclusions of Law heretofore signed, and of Objections to Plaintiffs' Proposed Findings and Conclusions and Motion to Amend same; Notice of Intention of the Defendant to Move for New Trial; Minute Order Entered February 19, 1945; Judgment; Notice of Entry of Order Denying Motion for New Trial; Notice of Appeal; Bond on Appeal; Designation of Record on Appeal; Affidavit of M. Perelli-Minetti in Support of Order Transferring Original Papers and Exhibits and Order Transferring Original Papers and Exhibits to the Circuit Court of Appeals which, together with copy of Reporter's Transcript and Original Plaintiffs' Exhibits 1 to 6 inclusive and Original Defendant's Exhibits A to K inclusive constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$15.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 14 day of June, 1945.

EDMUND L. SMITH,

(Seal)

Clerk

By THEODORE HOCKE

Chief Deputy

[Title of District Court and Cause.]

Hon. Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS OF TRIAL

Los Angeles, California, Wednesday, January 10, 1945.
10 a. m.

The Clerk: Albert C. Arthur, et al., v. Western Loan
& Building Company, for trial.

Mr. Perelli-Minetti: At this time, your Honor, I would
like to move for admission to this court for the purpose of
trial of this case Mr. H. L. Mulliner, of Salt Lake City,
general counsel of this company, a practicing attorney of
Salt Lake City, admitted to practice in the Ninth Circuit.

The Court: Do you vouch for his character?

Mr. Perelli-Minetti: I do.

The Court: Motion granted. Are you ready to
proceed?

Mr. Wilson: Yes, your Honor.

H. B. ESTES,

called as a witness in behalf of the plaintiffs, being first
duly sworn, testified as follows:

The Clerk: Will you state your name, please.

A. H. B. Estes.

The Clerk: And your address?

A. 386 Highland Avenue, San Bernardino.

Direct Examination

Q. By Mr. Wilson: Mr. Estes, you are one of the
plaintiffs here? A. Yes, sir.

Q. What is your business?

A. Real estate business. [2*]

(Testimony of H. B. Estes)

Q. How long have you been a real estate broker?

A. About 15 years.

Mr. Wilson: If your Honor please, during the pre-trial we had occasion to use some papers. Are we to observe the same numbering now that we used then?

The Court: Were they numbered then? Do you have your exhibits that you propose to offer?

Mr. Wilson: Yes.

The Court: Just hand them to the Clerk and he will mark them all for identification numerically now. Will you describe them as you hand them to the Clerk?

Mr. Wilson: 1 is the purchaser's copy of the Offer to Purchase.

2 are two telegrams of revocation dated May 8th.

3 are two letters of revocation of the same date.

4 is a prospectus or listing dated January, 1942.

5 is a similar document dated January, 1944.

6 is the broker's copy of the Offer to Purchase.

Q. By Mr. Wilson: Referring to Exhibit 1 for Identification, does it bear your signature? A. Yes.

Q. And the signature of your co-plaintiff, Albert C. Arthur? A. Yes, sir.

Mr. Wilson: We will offer this exhibit, your Honor, as Exhibit 1. [3]

Mr. Mulliner: No objection.

The Court: Admitted.

[Note: Exhibit No. 1 is the same as Exhibit No. 6, except for initials to portion stamped on face of exhibit. Exhibit No. 6 will be found at p. 69.]

Mr. Wilson: Mr. Mulliner, do you have the originals of these?

(Testimony of H. B. Estes)

(The papers were produced by Mr. Mulliner.)

Mr. Wilson: Your Honor, as Exhibit 2 I offer in evidence the two documents, being the telegrams of May 8th, which comprise carbon copies, and as Exhibit 7 the two original telegrams received pursuant thereto.

The Court: Did the witness testify that these are carbon copies of telegrams that were sent?

Mr. Wilson: I would have to do that. There isn't any controversy between us, I think, about the papers. Is there, gentlemen?

Mr. Mulliner: There is no dispute but what they were sent and received as indicated on the originals.

The Court: On or about the date they bear? Very well, 2 is in evidence and 7 is in evidence.

Mr. Wilson: Do you have the two letters, Mr. Mulliner, of May 8th?

The Court: This No. 7 comprises the originals of No. 2?

Mr. Mulliner: That is correct.

Mr. Wilson: No. No. 7 is the telegram as received. No. 2 is the copy of the telegram as sent.

The Court: No. 7 is the original telegram that was received by the defendants? [4]

Mr. Wilson: Yes.

The Court: In other words, it is just a copy of 2?

Mr. Wilson: It should be if it was properly transmitted.

The Court: All right. I think we will just make these all one exhibit then. Make them No. 2.

[PLAINTIFFS' EXHIBIT 2]

WESTERN UNION

* * * * *

1944 MAY 8 P M 10 13

DUPLICATE OF TELEPHONED TELEGRAM

SO411NL—SANBERNARDINO CALIF 8

WESTERN LOAN AND BLDG CO—

308 WEST OLYMPIC BLVD LOSA—

YOU ARE HEREBY NOTIFIED THAT THE UNDERSIGNED ALBERT C ARTHUR AND H B ESTES HEREBY WITHDRAW AND REVOKE THEIR OFFER DATED APRIL 1ST 1944 TO PURCHASE LOTS THIRTEEN FOURTEEN AND FIFTEEN IN BLOCK E OF THE PALMS IN THE CITY OF SAN BERNARDINO SAN BERNARDINO COUNTY CALIFORNIA COMMONLY KNOWN AS THE NORMAN MANOR AND NORMAN MANOR ANNEX APARTMENTS AND HEREBY DEMAND RETURN OF FOUR THOUSAND THREE HUNDRED THIRTY SEVEN DOLLARS AND FIFTY CENTS DELIVERED TO YOU AS A DEPOSIT IN CONNECTION WITH SAID OFFER—

ALBERT C. ARTHUR H B ESTES.

1 1944

[Written]: Rec'd here May 10 9 15 AM. Pr—7383

Mr. Sullivan FJ 921a Mailed

(Plaintiffs' Exhibit 2)

WESTERN UNION

* * * * * * * * *

1944 MAY 9 AM 4 13

SE6 NL—SANBERNARDINO CALIF 8

WESTERN LOAN AND BLDG CO—

SALT LAKE CITY UTAH—

YOU ARE HEREBY NOTIFIED THAT THE UNDERSIGNED ALBERT C ARTHUR AND H B ESTES HEREBY WITHDRAW AND REVOKE THEIR OFFER DATED APRIL 1ST 1944 TO PURCHASE LOTS THIRTEEN FOURTEEN AND FIFTEEN IN BLOCK E OF THE PALMS IN THE CITY OF SAN BERNARDINO SAN BERNARDINO COUNTY CALIFORNIA COMMONLY KNOWN AS THE NORMAN MANOR AND NORMAN MANOR ANNEX APARTMENTS AND HEREBY DEMAND RETURN OF FOUR THOUSAND THREE HUNDRED THIRTY SEVEN DOLLARS AND FIFTY CENTS DELIVERED TO YOU AS A DEPOSIT IN CONNECTION WITH SAID OFFER—

ALBERT C ARTHUR H B ESTES

1 1944 E

Case No. 3815-PH Arthur, et al. vs. West. Loan. Plfs.
Exhibit No. 2. Date Jan. 10, 1945. No. 2 in Evidence.
Clerk. U. S. District Court, Sou. Dist. of Calif. J. M.
Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,
Clerk.

(Testimony of H. B. Estes)

Mr. Wilson: That is all right. Your Honor, I have the originals of the two letters marked Exhibit 3.

Q. By Mr. Wilson: Referring to the originals of the two letters marked Exhibit 3, Mr. Estes, does each of these letters bear your signature?

A. (After examining) They do.

Q. And of your co-plaintiff? A. Yes, sir.

Mr. Wilson: I would like to offer the originals, together with the copies thereof, marked Exhibit 3. as Exhibit 3.

The Court: Why encumber the record with additional copies?

Mr. Wilson: Or substitute the originals for the copies, which would probably be better.

The Court: Do you have any objection to the originals going in?

Mr. Mulliner: No, I have none, your Honor.

[PLAINTIFFS' EXHIBIT 3]

San Bernardino, California,

May 8th, 1944.

Western Loan and Building Co.,

Salt Lake City, Utah.

Gentlemen:—

You are hereby notified that the undersigned, Albert C. Arthur and H. B. Estes, hereby withdraw and revoke their offer, dated April 1st, 1944, to purchase Lots Thirteen, Fourteen and Fifteen, in Block E, of the Palms, in the City of San Bernardino, San Bernardino County, California, commonly known as the Norman Manor and Norman Manor Annex Apartments, and hereby demand return of Four Thousand Three Hundred Thirty-seven Dol-

(Plaintiffs' Exhibit 3)

lars and Fifty Cents delivered to you as a deposit in connection with said offer.

Very truly yours,

Albert C. Arthur

H. B. Estes

San Bernardino, California,

May 8th, 1944.

Western Loan and Building Co.,

308 West Olympic Blvd.,

Los Angeles, California.

Gentlemen:—

You are hereby notified that the undersigned, Albert C. Arthur and H. B. Estes, hereby withdraw and revoke their offer, dated April 1st, 1944, to purchase Lots Thirteen, Fourteen and Fifteen, in Block E, of the Palms, in the City of San Bernardino, San Bernardino County, California, commonly known as the Norman Manor and Norman Manor Annex Apartments, and hereby demand return of Four Thousand Three Hundred Thirty-seven Dollars and Fifty Cents delivered to you as a deposit in connection with said offer.

Very truly yours,

Albert C. Arthur

H. B. Estes

[Stamped.]

Case No. 3815-PH Arthur, et al. vs. West. Loan. Plfs.
Exhibit No. 3. Date Jan. 10, 1945. No. 3 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. J. M.
Horn. Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,
Clerk.

(Testimony of H. B. Estes)

The Court: All right.

I think you can probably do that with these telegrams, too, because they just encumber the record. Is there any [5] difference between the telegrams as sent?

Mr. Wilson: I don't know.

The Court: The clerk will check them while you go on with your case.

Q. By Mr. Wilson: Referring to Exhibit 4, Mr. Estes, from whom did you receive that?

A. From Western Loan & Building Company.

Q. And is the page, at the head of which we note the words Norman Manor and Norman Manor Annex Apartments—rather, does that page relate to the property involved in the offer with which we are concerned here?

A. Yes, sir.

Mr. Wilson: I will offer this as Exhibit 4.

The Court: Admitted.

[PLAINTIFFS' EXHIBIT 4]

WE OWN

FREE AND CLEAR OF ENCUMBRANCE

Many Apartment Houses and Several Hotels in California

They Are FOR SALE

At Reasonable Prices and Convenient Terms

Northern California District

F. E. Sullivan

California Sales Manager

363 Fifteenth Street, Oakland

Glencourt 2436

(Plaintiffs' Exhibit 4)

Southern California District
J. A. Carron
Los Angeles Sales Representative
308 West Olympic Boulevard
Los Angeles
PRospect 7383

Orange, Riverside, San Bernardino Counties
Clyde Newton, Special Agent
16 Plaza Square, Orange
Orange 275

San Diego and Imperial Counties
Charles R. Berdel, Special Agent
426 B Street, San Diego
Franklin 2565

WESTERN LOAN AND BUILDING COMPANY
of
Salt Lake City, Utah

I.A CASA CONTENTA APARTMENTS

Real Estate 4014

1660 North "E" Street
San Bernardino, California

January, 1942

Title:	Vested clear in Seller.
Price:	\$30,000.00
Terms:	\$ 7,500.00 Cash
	\$22,500.00 Loan (Owner will fi- nance) payable at the rate of

(Plaintiffs' Exhibit 4)

\$ 202.50 Monthly, including interest.

Area of Land: 60' x 154' Approx.
 Improvements: Modern Two Story Stucco Building
 15 Furnished Units: 3 Singles
 12 Doubles

Equipment: Elect. Refrig.—Garage—Tile
 Drainboards

Income: 3 Singles: 12 Doubles:
 3 @ \$25.00 2 @ \$32.50
 10 @ 35.00
 Monthly \$490.00 Yearly \$5,880.00

Fixed Expenses:	Salaries	\$807.40	
(For 1941)	Fuel	429.40	
	Electricity	386.69	
	Water	91.35	
	Power	117.55	
	Phone	21.22	
	Supplies	31.79	
	Taxes	587.07	
	Insurance	76.33	
	Miscellaneous	121.40	2,670.20

*Total Expense

Schedule Net Income \$3,209.80

*Expense Repairs, painting, laundry, etc., expenses vary with different types of management and are therefore omitted.

(Plaintiffs' Exhibit 4)

While we believe the above information to be correct,
it is not guaranteed.

It Is Our Policy to Extend Brokers the Fullest Cooperation. If Your Client's Offer Is for Less Than the List Price—Submit It—We May Be Able to Render the Assistance That Will Enable You to Close the Sale.

WESTERN LOAN AND BUILDING COMPANY

Los Angeles Sales Office

308 West Olympic Boulevard

PRospect 7383

NORMAN MANOR and NORMAN MANOR ANNEX
APARTMENTS

480-498 Seventeenth Street and 1745 E Street

San Bernardino, California

January, 1942

Real Estate 4427

Real Estate 4430

Title: Vested clear in Seller.

Price: \$87,500.00

Terms: \$21,875.00 Cash

\$65,625.00 Loan (Owner will finance) payable at the rate of

\$ 590.63 Monthly, including interest.

Area of Land: 150' x 170' Approx.

Improvements: Modern Two-Story Stucco Buildings

42 Furnished Units:

30 Singles 12 Doubles

(Plaintiffs' Exhibit 4)

Equipment:	Electric Refrig.—Tile Baths and Sinks		
Income:	30 Singles:	12 Doubles:	
	2 @ \$27.50		
	9 @ 30.00	1 @ \$40.00	
	12 @ 32.50	1 @ 42.50	
	7 @ 35.00	10 @ 45.00	
	Monthly	\$1,492.50	
	Yearly	\$17,910.00	
Fixed Expenses:	Salaries	\$3,015.89	
(For 1941)	Fuel	654.86	
	Electricity	880.85	
	Water	255.43	
	Power	209.70	
	Phone	48.48	
	Supplies	140.29	
	Taxes	2,225.73	
	Insurance	282.05	
	Miscellaneous	142.15	7,855.43

*Total Expense

Schedule Net Income \$10,054.57

*Expense: Repairs, painting, laundry, etc., expenses vary with different types of management and are therefore omitted.

While we believe the above information to be correct, it is not guaranteed.

It Is Our Policy to Extend Brokers the Fullest Cooperation. If Your Client's Offer Is for Less Than the List Price—Submit It—We May Be Able to Render

(Plaintiffs' Exhibit 4)

the Assistance That Will Enable You to Close the Sale.

WESTERN LOAN AND BUILDING COMPANY
Los Angeles Sales Office
308 West Olympic Boulevard
PRospect 7383

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Plfs. Exhibit No. 4. Date Jan. 10, 1945. No. 4 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Q. By Mr. Wilson: From whom did you receive, if you did receive them, these documents comprising 5 for identification?

The Court: Where did this No. 4 come from?

Mr. Wilson: The same place.

The Court: The same place?

Mr. Wilson: Yes, sir. From the defendant.

Mr. Mulliner: May I see that, please?

Mr. Wilson: Pardon me. I thought you saw it (handing). The writings on the back, of course, are not to be considered as having anything to do with the lawsuit.

The Clerk: These are copies, these telegrams, Exhibit No. 2. [6]

The Court: All right, return the carbons.

Mr. Wilson: Does the original show the date it was sent?

(Testimony of H. B. Estes)

The Clerk: Yes.

Mr. Wilson: What date does it bear?

The Clerk: May 8th.

Mr. Mulliner: There is no objection to Exhibit 4, your Honor, except, of course, he says that the lead pencil notations on the back are no part of the exhibit.

Mr. Wilson: They are to be ignored.

The Court: It will be admitted except for the pencil notations on the back of the document.

Q. By Mr. Wilson: This document marked 5 for identification, from whom did you receive it?

A. Western Loan & Building Company.

Q. And does the page which relates to the Norman Manor, and so forth, Apartments refer to the property involved in this lawsuit? A. It does.

Mr. Wilson: We will ask that this be admitted as Exhibit 5.

Mr. Mulliner: We have no objection to No. 5, your Honor.

The Court: Admitted.

[PLAINTIFFS' EXHIBIT 5]

WESTERN LOAN AND BUILDING COMPANY

This listing cancels all previously issued. Information herein is compiled from reliable sources, but is not guaranteed to be correct. All listings are subject to change of price or terms, prior sale, or withdrawal, all without notice of any kind, and also to all existing conditions, restrictions, zoning regulations, easements, taxes, and other encumbrances.

Important Brokers will please apply at this office for permission to inspect income properties or to show prop-

(Plaintiffs' Exhibit 5)

erty to their clients between the hours of 10:00 A. M. and 4:00 P. M.

All information with reference to sales, terms or other data, must be secured from this office. We do not accept names of prospects registered by brokers. All offers must be accompanied by a five per cent deposit in cash, or certified or cashier check, made payable to Western Loan and Building Company. All offers are subject to approval by the Executive Committee of Western Loan and Building Company.

Five per cent (5%) commission on first \$20,000.00 and two and one-half per cent (2½%) on balance purchase price, payable at close of escrow, and if escrow is completed and closed and not otherwise.

Nothing contained in the above instructions or in this listing of properties shall be considered or construed as constituting an offer in any form by Western Loan and Building Company to sell any property. The above information and this listing are issued solely for the convenience of interested parties and all offers must originate with prospective purchasers. Western Loan and Building Company will not be bound in any manner by any statements contained herein.

Terms of Sale:

Minimum down payment twenty-five per cent (25%) of list price. (Deed will be given and deed of trust taken back for unpaid balance.) Minimum monthly payment nine dollars per month per thousand of unpaid balance

(Plaintiffs' Exhibit 5)

and includes interest. Taxes and insurance may be paid monthly in addition to regular monthly payments of interest and principal.

Interest will begin from close of escrow. Taxes, rents, insurance, salaries, utilities, etc., will be pro-rated at close of escrow. All monthly payments commence on the sixteenth day of the month. Brokers will allow at least thirty (30) days from date of deposit to date of closing.

It Is Our Policy to Extend Brokers the Fullest Cooperation. If Your Client's Offer Falls Slightly Short of Our List Price—Submit It—We May Be Able to Render the Assistance That Will Enable You to Close the Sale.

January, 1944

NORMAN MANOR AND NORMAN MANOR
ANNEX APARTMENTS

480-498 Seventeenth Street and 1745 E Street
San Bernardino, California

January, 1944

Real Estate 4427

Real Estate 4430

Title: Vested clear in Seller.

Price: \$87,500.00

Terms: 21,875.00 Cash

65,625.00 Loan (Owner will finance) payable at the rate of \$590.63 Monthly, including interest.

(Plaintiffs' Exhibit 5)

Area of Land:	150' x 170' Approximately.		
Improvements:	Modern Two Story Stucco Buildings		
	42 Furnished Units: 30 Singles.		
	12 Doubles.		
Equipment:	Electric Refrigeration—Tile Baths and Sinks		
Income:	30 Singles: 12 Doubles:		
	1 @ \$27.50	1 @ \$40.00	
	8 @ 30.00	1 @ 42.50	
	13 @ 32.50	10 @ 45.00	
	8 @ 35.00		
O.P.A. Ceiling . . .	Monthly	\$ 1,502.50	
	Yearly	\$18,030.00	
Fixed Expenses:	Fuel	806.80	
(For 1943)	Electricity	939.44	
	Water	332.45	
	Power	214.58	
	Phone	70.79	
	Taxes	2,444.80	
*Total Expenses:	Insurance	272.19	5,081.05
<hr/>			
Schedule Net Income	\$12,948.95		
*Expense	Salaries, supplies, repairs, painting, miscellaneous, laundry, etc., expenses vary with different types of management and are therefore omitted.		

While we believe the above information to be correct,
it is not guaranteed.

(Plaintiffs' Exhibit 5)

It Is Our Policy to Extend Brokers the Fullest Cooperation. If Your Client's Offer Is for Less Than the List Price—Submit It—We May Be Able to Render the Assistance That Will Enable You to Close the Sale.

WESTERN LOAN AND BUILDING COMPANY

Los Angeles Sales Office

308 West Olympic Boulevard

Zone 15

PRospect 7383

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Plfs. Exhibit No. 5. Date Jan. 10, 1945. No. 5 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Q. By Mr. Wilson: Referring to 6 for identification, Mr. Estes, does it bear your signature? [7] A. Yes.

Q. And that of your co-plaintiff, Albert C. Arthur?

A. Yes.

Q. And the signature on the reverse side is likewise yours? A. Yes.

Mr. Wilson: We will offer this as Exhibit 6, your Honor.

The Court: Have you seen that?

Mr. Mulliner: That is an exact duplicate, is it not, of 1?

Mr. Wilson: I wouldn't say that, Mr. Mulliner. We have no endorsement on the back of No. 1 similar to that which appears on 6.

(Testimony of H. B. Estes)

The Court: What is No. 6 and where did it come from, the blue page there, Mr. Witness?

The Witness: That was the broker's copy.

The Court: What does that mean? How did you get it?

The Witness: It was given to me by the Western Loan & Building Company.

The Court: When?

The Witness: At the time this offer was made.

The Court: At the same time you received Exhibit No. 1?

The Witness: Yes, sir.

The Court: Where did you fill those out, or did you fill them out? [8]

The Witness: I think the company filled them out.

The Court: At the office of the company?

The Witness: They brought the papers down with them and we signed them and they were all signed at the same time.

The Court: Who is "they"?

The Witness: Western Loan & Building Company.

The Court: I know, but that is a corporation. Whom do you mean by "they"? Who did it for them? What is the man's name or woman's name?

The Witness: Mr. Carron or Mr. Sullivan.

The Court: Both of them?

The Witness: One or the other.

The Court: Brought them to your office?

The Witness: Yes, sir.

The Court: When? On or about the date they bear?

The Witness: Yes, sir.

(Testimony of H. B. Estes)

The Court: And you signed them?

The Witness: I am not sure if it was signed at my office or at the California Hotel where the papers were signed.

The Court: All right.

Mr. Mulliner: You have some lead pencil notations. I suppose they can be ignored?

Mr. Wilson: They mean nothing.

Mr. Mulliner: The only difference appears to be that there is a notation on Exhibit 6 on the back with relation to brokerage fees that does not appear on the back of No. 1. [9] Otherwise they are identical.

The Court: You mean it is a printed form?

Mr. Mulliner: Yes, there is a printed form and also Mr. Estes' signature, I assume.

The Witness: Yes, sir.

The Court: All right.

Mr. Mulliner: We have no objection to Exhibit 6.

The Court: Admitted.

[PLAINTIFFS' EXHIBIT 6]

No. 4—Managing Agent's or Broker's Copy

OFFER TO PURCHASE

The undersigned hereby offers to purchase from Western Loan and Building Company, as owner, the following described property:

Legal Description

Lots 13, 14, 15 and Block E of the Palms, City of San Bernardino, San Bernardino County, California, commonly known as the Norman Manor and Norman Manor Annex Apartments.

(Plaintiffs' Exhibit 6)

I have examined the above described property and improvements and accept the same in their present condition, waiving any and all patent or latent defects therein and agree that there are no oral representations relied upon and there are no negotiations or understandings except as herein embodied and expressed.

The undersigned Offerer understands and agrees that upon receipt of this offer and pending approval and closing that other sales may be lost to the Owner, Western Loan and Building Company; that the Owner will at once commence investigation hereon and cause appraisals to be made and an examination by its Executive Committee to be had, that some time and a substantial expense will be required, and that the exact loss and expense to Owner cannot be determined. To cover such, a deposit as stated below is agreed upon and settled as the amount required reasonably to indemnify Owner and as liquidated damage to be retained by it if after acceptance hereof this sale is not completed by reason of any fault or failure of mine, or if this offer is withdrawn prior to May 1st, 1944. The Offerer hereby agrees that this offer shall remain open and irrevocable to and including May 1st, 1944, unless sooner rejected or accepted, and for the consideration aforesaid, gives and grants to the Owner an exclusive option to sell said property to the undersigned herein under the terms hereof to and including said date.

Property No. R.E 4427-4430 City San Bernardino
County San Bernardino State California

Street Address 480-98 17th St—1745 E Street Size of

(Plaintiffs' Exhibit 6)

Lot 150' x 170' (More or Less)

Albert C. Arthur; unmarried and
 Name of Purchaser H. B. Estes and Catherine Estes
 (Married..... Single.....) Age.....

Alber C. Arthur, 4th and E Streets, San Bernardino,
 Calif.

Address H. B. Estes and Catherine Estes, 439 24th St.,
 San Bernardino, Calif. City

Wife's or Husband's Name..... Age.....

Albert C. Arthur, unmarried, and
 Grant Deed to be taken in name of H. B. Estes and Cath-
 erine Estes, husband and wife, as joint tenants.
 Title to be conveyed free and clear of all encum-
 brances of record except as hereinafter specified and
 except encumbrances done, made, suffered, or incurred
 by the buyer. Subject to all restrictions, conditons,
 reservations, rights of way and easements, if any.

I Have Read the Deed of Trust HBE. ACA
 And Note. and They Are Satisfactory HBE. ACA

Sale Plan	Deed of Trust
Sale Price	\$86,750.00
Amount of Cash	\$21,000.00
Balance of	\$65,750.00 to be paid in the following

manner: In monthly installments of \$591.75 including
 6% interest & principal on the 16th day of each month,
 commencing May 16, 1944 until fully paid. Purchaser to
 pay interest at 6% in escrow on the face value of the
 note from the closing date to the date of the first pay-
 ment. Purchaser to receive a bill of sale to sellers right,
 title and interest in furniture, furnishings & equipment
 on premises and give seller a chattel mortgage to same

(Plaintiffs' Exhibit 6)

furniture, furnishings and equipment. Purchaser to furnish seller with a War Damage Insurance Policy. Purchaser to pay seller the unearned premium on \$65,750.00 Fire Insurance Policy that will be furnished by seller. Rents and Taxes to be pro-rated to closing date, also public utilities. Purchaser to have the privilege of paying an additional sum of \$4931.25 in any one calendar year and also the privilege of paying the entire balance, if any, at the end of 120 months from date of close of escrow.

All written instruments necessary to consummate this transaction shall contain, in addition to the above terms, the provisions of and shall be on owner's printed forms, copies of which have been examined by the purchaser and are by him approved.

Closing Date May 15, 1944

Ins. to be pro rated To closing date

Taxes to be paid by Owner To closing date

Assessments to be paid by Owner None

Refund \$ of earned premium to seller

By Purchaser After closing date

By Purchaser After closing date

This Offer Is Made at the Above Mentioned
Price and Terms.

Subject to the Acceptance of the Owner.

I Agree to Purchase the Above Described Property on
the Above Terms.

Albert C. Arthur H. B. Estes
Purchaser

.....
Witness

Purchaser Employed By.....

(Plaintiffs' Exhibit 6)

Received the sum of \$4,337.50 as deposit on the above sales proposal, subject to conditions herein.

Date April 1st, 1944

License No.

Individual or Firm submitting offer

Confidential Information Sheet

* * * * *

* * * Amounting to \$4,000.00

How payable? at close of escrow * * *

Payable to what person or firm? H. B. Estes, 386 Highland Ave., San Bernardino, Calif.

Remarks: (Cover any special features). H. B. Estes

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Plfs. Exhibit No. 6. Date Jan. 10, 1945. No. 6 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Case No. 3815-PH Arthur, et al. vs. West. Loan. Defts. Exhibit A. Date Jan. 10, 1945, No. A identification. Clerk, U. S. District Court. Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien. Clerk.

Q. By Mr. Wilson: I note on Exhibit 6. Mr. Estes, that your commission in securing the offer is fixed at \$4,000. I note also in Exhibits 4 and 5 that the commission provided is less than \$4,000. Do you have that in mind? A. Yes, sir.

(Testimony of H. B. Estes)

Q. Referring to the prospectus of January, 1942, which is Exhibit 4, the commission rate or percentage is not specified. Do you observe that? A. Yes, sir.

Q. And that in the prospectus dated January, 1944, being our Exhibit 5, the broker's commission is specified as 5 per cent on the first \$20,000 and 2½ per cent on the balance. Of course, it is obvious that the commission on this deal at the price listed in the listing or prospectus is something over \$4,000. Did you discuss the subject of your commissions with any person identified with the defendant before this offer of Exhibit 1 was signed?

A. I discussed it with either Mr. Carron or Mr. [10] Sullivan.

Q. Who were Mr. Carron and Mr. Sullivan?

A. Well, they represent the Western Loan & Building Company.

Q. What part did they have in the negotiations which culminated in the signing of this Exhibit 1 by you and Mr. Arthur?

A. Well, they were to represent for the Western Loan & Building Company.

Q. I am not talking about what transpired after you got together. I am talking about before you began to negotiate with Mr. Arthur as a prospect along with yourself.

A. I don't understand exactly what you mean.

The Court: Who were they? How did you happen to deal with them instead of Joe Doakes of the Western Building & Loan?

The Witness: They were the representatives of the Western Building & Loan.

The Court: Did they maintain offices in San Bernardino?

(Testimony of H. B. Estes)

The Witness: They maintained offices in Los Angeles.

The Court: How do you know they were the representatives?

The Witness: Because I had contacted them in Los Angeles and they had contacted me in San Bernardino.

The Court: You mean you had called the Western Building & Loan Company here? [11]

The Witness: Yes, and they had called me in San Bernardino.

The Court: And stated they were the representatives of the Western Building & Loan?

The Witness: Well, I don't know if they stated it or not, but they were in the Western Building & Loan's office.

The Court: I see. All right.

Q. By Mr. Wilson: Did they confer with you relative to the—

The Court: You mean they were engaged there? They were not just customers standing around like in the lobby of the Biltmore Hotel?

The Witness: That was their office.

The Court: All right.

Q. By Mr. Wilson: On Exhibit 4 we have the name of F. E. Sullivan, the California sales manager of the Northern California District, and J. A. Carron, similarly designated for the Southern California District. Did you discuss with them prior to the time that you began to negotiate with Mr. Arthur this business of endeavoring to find a purchaser for this property described in the offer as the Norman Manor Apartments and Annex?

A. Yes, sir.

Q. And particularly did you discuss with them the subject of your commission? A. Yes, sir. [12]

Q. And with whom did you discuss this subject?

(Testimony of H. B. Estes)

A. With Mr. Carron and with Mr. Sullivan.

Q. When and where?

A. Well, I discussed it in their office in Los Angeles and in my office in San Bernardino.

Q. Did you discuss it with them prior to January, 1944? A. Yes, sir.

Q. Had you represented as broker the Western Building & Loan Company in transactions prior to the one which is involved in this lawsuit? A. Yes, sir.

Q. And as such broker had you received a commission? A. Yes, sir.

Q. And had there been an agreed basis upon which your compensation should be computed prior to January, 1944? A. Yes, sir.

Q. What was it?

A. It was about—I don't know the exact rate but it was about 5 per cent.

Q. When you received the prospectus, Exhibit 5, which reduced your commission from 5 per cent or thereabouts to 5 per cent of the first \$20,000 and thereafter 2½ per cent, did you discuss with Mr. Carron or Mr. Sullivan or both the subject of your commission in future deals? A. Yes, sir.

Q. What was said by either or both? [13]

A. I told them I would have to have a full 5 per cent commission.

Q. And what was said by them?

A. They said they would take it up with their Salt Lake office and see what could be worked out.

Q. Now, on the basis of the price specified in Exhibit 1—

The Court: Pardon me. May I interrupt with a question there? Was the reverse side of Exhibit No. 6, indi-

(Testimony of H. B. Estes)

cating your brokerage fee to be \$4,000, and which you signed, filled in on or about the date the instrument bears?

The Witness: It was filled in by the Western Loan & Building Company because that is the way they brought all the papers down.

The Court: That was filled in there at the time you executed the fore part of the agreement?

The Witness: Yes, sir.

The Court: You signed your name on the reverse side at the same time with the sum of \$4,000 in there?

The Witness: Yes, sir.

The Court: All right. Excuse me.

Q. By Mr. Wilson: On the basis of the price specified in Exhibit 1 and in Exhibit 6, namely, \$86,750, a 5 per cent commission would aggregate \$4,337.50, whereas the actual commission specified on the back of Exhibit 6 is \$4,000 even. Was there any discussion about the difference between the [14] computed commission on the basis of 5 per cent and the actual commission specified in Exhibit 6?

A. The way I remember it, I cut my commission approximately \$300—

Q. Did you talk about it with somebody, discuss it with somebody?

A. I discussed it with Mr. Carron and Mr. Sullivan.

Q. All right.

The Court: What did you say and what did they say about it?

The Witness: I agreed to cut the commission \$375 and I think they cut the price of the property an equal amount, \$375.

The Court: That was the substance of your conversation with them?

(Testimony of H. B. Estes)

The Witness: Yes.

The Court: That was before you executed this?

The Witness: Yes, sir.

The Court: Before it was drawn?

The Witness: Yes.

The Court: All right.

Q. By Mr. Wilson: With relation to April 1, 1944, that being the date that you signed, apparently that is the date these documents bear, with respect to that date when did you discuss this business of cutting your commission down to \$4,000 even? [15]

Mr. Mulliner: I can't see the materiality of this, your Honor. There is no point raised on it that I know of. I will object to it as immaterial and irrelevant.

Mr. Wilson: I think the relevancy will appear later, your Honor.

The Court: What is it? Tell me.

Mr. Wilson: I am going to endeavor to show that two departures were made with respect to the listing or prospectus; first, the price as therein set forth was \$87,500, whereas the price set forth in the offer is \$86,750, or \$750 less; the second is the one I have heretofore developed, that the commission according to the prospectus would have been something less than \$4,000, just what it is I have not figured out, but that his regular commission was in fact something more than \$4,000, and, therefore, the amount of his commission, as Mr. Estes has said, was something to be determined by the main office in Salt Lake City.

The Court: All right. Overruled. What was the unanswered question? When was this conversation?

(Testimony of H. B. Estes)

Q. By Mr. Wilson: Yes, with relation to April 1, 1944.

A. I don't understand your question.

Q. You said you told Mr. Carron or Mr. Sullivan or both, before you signed this paper, Exhibit 6, in which your commission is specified as \$4,000 even, that you would cut your commission to \$4,000. Now, I want to know—and the paper bears the date of April 1, 1944. I want to know when [16] with relation to April 1, 1944, did you discuss this matter in which you said you had cut your commission to \$4,000? Was it a week or two before, or a month or two before, or when was it with relation to this particular deal that the discussion took place?

A. It was not with this one particular deal but it was any deal that I might handle for the Loan Company, that I wanted a full 5 per cent commission.

Q. Yes, you have told us that, but with respect to this particular deal in which Mr. Arthur was to be identified you said you cut your commission to \$4,000, which is something less than 5 per cent. Now, when did you first discuss cutting your commission to \$4,000 with relation to this particular deal?

A. I would say approximately a month before.

Q. How long were you and Mr. Arthur—rather, how long were you endeavoring to interest Mr. Arthur in the purchase of this property?

A. I would say approximately two months.

Q. All right. And where did this conversation occur that you have just now referred to and in which you had agreed that if the deal went over your commission would be \$4,000?

A. Well, it was either in their office or my office. I don't know which.

(Testimony of H. B. Estes)

Q. And the reply was as you have stated, that it would [17] be a subject for determination by the Salt Lake people? A. Yes, sir.

Q. When was it that the—

The Court: I don't remember that he said they—I thought he said he agreed to cut his commission \$300 and they agreed to reduce the price.

Mr. Wilson: \$375, your Honor.

The Court: \$375. Was anything said about submitting it to Salt Lake?

The Witness: Everything would have to be submitted to Salt Lake.

The Court: Is that what they told you?

The Witness: Yes, sir, that everything would have to be submitted to Salt Lake.

The Court: Very well.

Q. By Mr. Wilson: I have already called your attention to the fact that the list price of this property, the Norman Manor and the Annex, was \$87,500.

A. Yes, sir.

Q. As shown by Exhibits 4 and 5. The offer, Exhibit 1, and the duplicate thereof, Exhibit 6, all specify the price at \$86,750, or \$750 less than the list price. Now, my question is, was there some discussion with somebody about the difference between the list price and the offered price as set forth in these two exhibits?

A. Yes, sir. [18]

Q. When and where did it take place and with whom?

A. It took place between Mr. Carron or Mr. Sullivan and myself, either in their office or my office.

Q. What was said by whom?

Mr. Mulliner: Let us see. When was this?

The Court: Yes, when was it?

(Testimony of H. B. Estes)

Mr. Mulliner: May we have the foundation?

The Witness: What date?

The Court: Approximately.

The Witness: Approximately a month, I would say.

The Court: Before April 1st?

The Witness: Yes, sir, before the contract was signed.

The Court: All right.

Q. By Mr. Wilson: What was said?

A. That they would take it up with Salt Lake, with their home office.

The Court: What did you say?

The Witness: Well, I told them I wanted a full 5 per cent commission.

The Court: No: about the price.

Q. By Mr. Wilson: We are talking about the price. The difference in price, as I have indicated, was \$750, the difference between the list price and the offered price was \$750.

A. Yes, sir.

Q. I want to know if you talked about that difference, and, if so, with whom and when? [19]

A. Yes, sir, I talked to Mr. Carron and Mr. Sullivan

Q. At the places you stated?

A. Yes, either my office or theirs.

Q. What was said?

A. They said they would take it to their home office.

The Court: What did you say?

Q. By Mr. Wilson: What did you say?

A. I don't understand.

The Court: They didn't just walk in the room and say, "We will submit it," did they, without your saying anything? You must have said something to them, didn't you? You said, "Well, I am here. I have got somebody that wants to buy the property"?

(Testimony of H. B. Estes)

The Witness: Yes, sir.

The Court: What did you say?

The Witness: I told them I had an offer on the property of that much money.

The Court: How much?

The Witness: \$86,750.

Q. By Mr. Wilson: Did you tell them from whom you had received such an offer? A. Yes, sir.

Q. And did you identify the person in the conversation? A. Yes, sir.

Q. Whom did you say it was?

A. Mr. Arthur. [20]

Q. Had he previously submitted an offer?

A. I don't know. Not through me.

Q. Not through you? A. No, sir.

Q. Was this the first offer as far as he was concerned?

A. Yes, sir.

The Court: And then what did they say?

The Witness: They said they would submit it to Salt Lake City for their approval.

The Court: All right.

Q. By Mr. Wilson: Then how long after that was it before—strike that, please.

Were some papers drawn which purported to set forth the substance of the conclusions of your several negotiations, both with relation to the commission and with relation to the price? A. Just a few days afterwards.

Q. And who prepared the papers?

A. They were prepared, I think, in the Los Angeles office.

Q. At any rate they were prepared when they were presented to you? A. Yes, sir.

(Testimony of H. B. Estes)

Q. Was Exhibit 1 in the form in which we see it now with the exception of the signatures appended thereto, at the time it was presented to you for signature? [21]

A. Yes, sir.

Q. And the same is true with respect to Exhibit 6?

A. Yes.

Q. Exhibit 6 is your copy, the broker's copy?

A. Yes.

Q. There was still another copy, I assume?

Mr. Wilson: Wasn't there another copy, Mr. Mulliner? Do you have it?

Mr. Mulliner: Yes, we have a copy.

Mr. Wilson: This is off the record.

(Discussion off the record.)

The Court: Is it stipulated to that this offer was made up in triplicate?

Mr. Mulliner: The fact is, I think, that there was an original and three copies made.

The Court: Three carbons?

Mr. Mulliner: That is right. I think 6 is one of those copies.

The Court: Is Exhibit 1 the original?

Mr. Mulliner: Yes.

The Court: Is that stipulated to?

Mr. Wilson: Yes, your Honor.

The Court: And Exhibit 6 is one of the carbons?

Mr. Wilson: That is right.

The Court: Where are the other carbons? May that be stipulated to? [22]

Mr. Mulliner: One went to the sales office here in Los Angeles and the other went to the home office in Salt Lake City.

The Court: So stipulated?

(Testimony of H. B. Estes)

Mr. Wilson: So stipulated, your Honor.

Q. By Mr. Wilson: When these documents, the several documents which you and Mr. Arthur signed, were presented to you, who presented them?

A. Either Mr. Carron or Mr. Sullivan.

Q. At that time was there any further discussion about the variance between the commission, your commission—the variance set forth at least on Exhibit 6 and the commission as set forth in the prospectus or listing?

A. No, sir, that was settled before.

Q. There was no further discussion?

A. No, sir.

Q. When the documents were presented in the form in which we now find them, was there any further discussion relative to the variance between the price offered and the list price?

A. No, sir.

Q. Was there any discussion at that time—

The Court: Pardon me. Was Mr. Arthur present when you had any one of these conversations with Mr. Carron?

The Witness: Yes, sir, he was there when the papers were signed. [23]

The Court: He was present during the conversation at which time the papers were signed?

The Witness: Yes, sir.

The Court: Very well. All right.

Q. By Mr. Wilson: After the documents were signed, apparently in quadruplicate, of which we have Exhibits 1 and 6 as two of the four, what was done with the two which were not given, one to you and one to Mr. Arthur?

A. They were taken back to Los Angeles, I presume.

Q. Who was there?

A. Either Mr. Carron or Mr. Sullivan.

(Testimony of H. B. Estes)

Q. In other words, whoever might have been there as the representative of the defendant took these other copies with him? A. Yes, sir.

Q. Well, at the time or prior to the time that this was accomplished, namely, the signing of these papers, what was said if anything about the next step?

A. That this deal would be submitted to the home office in Salt Lake City and we would have to wait for their approval.

Mr. Wilson: I see. You may cross examine, Mr. Mulliner.

Cross-Examination

Q. By Mr. Mulliner: Mr. Estes, weren't these papers made right there in your office?

A. The way I remember it, the papers were made up and [24] brought out from Los Angeles.

Q. Do you have a typewriter there?

A. Yes, sir.

Q. Does your wife work in your office?

A. No, sir.

Q. Did she work at any time? A. No, sir.

Q. Did she do any typing? A. She does typing.

Q. Did she do typing at home or in the office?

A. She will do typing sometimes at home but not in the office.

Q. Now, is it your testimony definitely that these papers were brought there or that you are uncertain, Mr. Estes? A. I am uncertain.

Q. As to where they were written? A. Yes, sir.

(Testimony of H. B. Estes)

Q. Now, you can surely remember when these papers were signed up whether that transaction on that day was handled by Mr. Carron or by Mr. Sullivan, can't you?

A. No, sir. I am confused on that. I don't know which one was there.

Q. Or whether they were both there?

A. They could have both been there or just one. I am not sure. [25]

Q. Now, you say when you made this offer of \$86,750, whoever handled the deal with you representing the company, or purporting to, told you that the offer would be submitted to the Salt Lake office? A. Yes, sir.

Q. You understood that that was the procedure from your previous transactions, did you not?

A. Yes, sir.

Q. And that the price would ultimately have to be approved by the Salt Lake office? A. Yes, sir.

Q. And you understood, did you not, that they were a building and loan association? A. Yes, sir.

Q. That they were subject to the supervision of the Building and Loan Commissioner? A. Yes, sir.

Q. And that certain appraisers had been designated or approved by the Building and Loan Commissioners and that those appraisers would make an appraisal of the property? A. Yes, sir.

Q. Prior to the time of the approval of the price?

A. Yes, sir.

Q. That that was the regular procedure, the procedure that had to be followed? A. Yes, sir. [26]

Q. Did you understand also that a director, one of the directors of the company in California, would also have to make an appraisal and give his approval?

A. I didn't know anything about a director.

(Testimony of H. B. Estes)

Q. Didn't you know that in the other transactions Mr. Scudder, Real Estate Commissioner for the State of California, had appraised the properties as a director of this company? A. No, sir.

The Court: You mean while he was Real Estate Commissioner?

Mr. Mulliner: Yes.

The Court: Oh, I was thinking of Building and Loan Commissioner.

Mr. Mulliner: Not in that capacity, your Honor, but in the capacity of a director.

Q. By Mr. Mulliner: You can't remember in any of these transactions that you have referred to whether you discussed it with Mr. Carron or Mr. Sullivan?

A. No, sir, I don't.

Q. Or whether you discussed it with both of them?

A. It could have been with one or both.

The Court: Why? Were their offices adjacent?

The Witness: No, sir. They were in the same office but I have done a good deal of business with the two and I can't segregate these business deals.

Q. By Mr. Mulliner: Were these discussions mainly in Los [27] Angeles or mainly over at your office in San Bernardino?

A. I would say mainly in my office in San Bernardino. I think mostly in my office.

Q. Do you have any definite recollection that any of them were in the office in Los Angeles, the ones that you referred to here?

A. Maybe once or twice in Los Angeles.

(Testimony of H. B. Estes)

Q. You say "maybe." You are not sure of them?

A. No, I am not sure of that.

Q. Whoever handled the transaction told you at the time that these were signed that it would take some time to get the necessary investigation, appraisals, and approval?

A. Yes, sir.

Q. And was it for that reason that you inserted in there the 45-day or the 15th day of May as the closing date?

The Court: The 1st of May, counsel, is inserted, is it not?

Mr. Mulliner: The closing date, I think, if I am not mistaken, is the 15th.

The Court: Oh, yes. May 1st is the—

A. I know there was a date inserted in there but I don't remember the date.

Q. By Mr. Mulliner: Well, the date was set—

The Court: Closing date, May 15th.

Q. By Mr. Mulliner (Continued): —in order to give [28] them sufficient time?

A. Yes, sir.

Q. In fact, on a previous transaction that you had had, in which you were one of the purchasers, a 30-day period was set up in the same portion of the same form of contract as here but an extension was afterwards granted?

Mr. Wilson: I object to it as immaterial.

The Court: Sustained.

Mr. Mulliner: I had not quite finished the question.

The Court: I beg your pardon.

Q. By Mr. Mulliner: Because of the fact that they were unable to make the necessary investigation, get the appraisals, and have the approval within that period?

(Testimony of H. B. Estes)

Mr. Wilson: I object to it as incompetent, irrelevant, and immaterial.

Mr. Mulliner. It goes to his knowledge.

Mr. Wilson: It is his knowledge as a broker. Mr. Estes, as is obvious, occupies a dual position. As a litigant here he is, of course, a purchaser primarily or prospective purchaser, and yet in the negotiations which led up to this series of writings he was also in the status of a broker. Now, what he knows as a broker might be relevant if it referred solely to his right to a commission.

The Court: I don't think the question is material in this matter, his knowledge of the time it took. I think any knowledge that he might have had concerning their manner of accepting deals would be admissible, but not this. The [29] objection is sustained.

Q. By Mr. Mulliner: Was the \$4,337.50 referred to in this Exhibit 1 paid to anyone at the time the instrument was signed?

A. Yes, sir.

Q. And how was that paid? A. By check.

Q. Do you have the check? A. No, sir.

Q. Whose check was it? A. Mr. Arthur's.

Mr. Mulliner: Do you have that check, Mr. Wilson?

Mr. Wilson: Yes (producing).

Mr. Mulliner: May I see it, please?

The Court: I notice counsel is sitting over in the jury box so he can hear. I forgot to tell you that if counsel will use the lectern in examining and cross examining the witnesses everybody talks loud enough for all to hear. So, if you could do that I am sure that everyone can hear.

Mr. Mulliner: Under your system of marking—

The Court: That will be A for Identification.

[DEFENDANT'S EXHIBIT A

FOR IDENTIFICATION]

San Bernardino, Cal. 4/1 1944 No. 1963

AMERICAN NATIONAL BANK 90-134

Pay to the

Order of Western Loan & Bldg. Co. \$4,337/50

Four Thousand Three Hundred Thirty Seven and 50/100

Dollars

Albert C. Arthur

Personal Account

* * * * * * * *

[Written in pencil]: R.E.—4427-30—N. Manor &
Annex.

[Stamped on back]: Pay to the Order of Bank of
America National Trust and Savings Association West-
ern Loan & Building Co. 600-6011.

[Stamped on back]: Pay to the Order of Any Bank,
Banker or Trust Co. or Thru Los Angeles Clearing House
Ass'n All Prior Endorsements Guaranteed. Apr 5, 44
0600 16-66 Los Angeles Headquarters 16-66 Bank of
America N. T. & S. A. Los Angeles, California 48

[Stamped on back]: Pay to the Order of Any Bank,
Banker or Trust Company All Prior Endorsements Guar-
anteed 90-132 Apr 6 1944 90-132 San Bernardino
Branch Bank of America National Savings Association
San Bernardino, California

Case No. 3815-PH. Arthur, et al. vs. West. Loan.
Defts. Exhibit A. Date Jan. 10, 1945. No. A Identifica-
tion. Clerk, U. S. District Court, Sou. Dist. of Calif.
J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,
Clerk.

(Testimony of H. B. Estes)

Q. By Mr. Mulliner: Did you see the check that we have just referred to on the occasion when it was delivered?

A. I saw Mr. Arthur write the check, yes, sir.

Q. Look at Exhibit A and see if you can state whether or not that is the check. [30]

A. (After examining) Yes, sir, that is the check.

Q. And the notations at the bottom of the check?

A. You mean the pencil writing?

Q. Yes. A. I don't know what that is.

The Court: Was that on there when you saw it?

The Witness: I don't believe it was.

Q. By Mr. Mulliner: Do you know whose handwriting that is? A. No, I don't.

Q. What does it say?

A. "RE-4427-30-N. Manor & Annex."

Q. That was the real estate number, wasn't it, of this property, under which it was listed and carried?

A. I am not sure. I don't know.

Q. It did have a number anyway?

A. I think so, yes.

Q. Do you think if you looked at those exhibits you could tell whether they were written on your typewriter or not, Mr. Estes? A. No, sir, I could not.

Q. You say you could not? A. No, sir.

Q. Reference was made to the telegrams—

The Court: Do you offer that check in evidence or do you just want it marked for identification? [31]

Mr. Mulliner: I have not offered it yet, your Honor. I was going to see a little more about some of the writing on there if I could.

(Testimony of H. B. Estes)

Q. By Mr. Mulliner: Were you present when these telegrams, Exhibit 2, were written?

A. I am not sure.

Q. Did you write them? A. No, sir.

Mr. Wilson: Mr. Mulliner, will you accept my—

Q. By Mr. Mulliner: You didn't see them written, did you? A. No, sir.

Mr. Wilson: Will you accept my stipulation with respect to the drafting of those documents?

Mr. Mulliner: I will talk with you about it.

Q. By Mr. Mulliner: Well, you know now that you were not present when they were written and you didn't see them either written or sent, isn't that correct?

A. No, sir; they could have been written while I was there but I am not sure.

Q. While you were there?

A. In Mr. Wilson's office.

Q. You didn't see anybody write them?

A. Mr. Wilson took some notations down and he might have written the telegram out.

Q. That is all you saw about it, his taking some notations? [32] A. That is right.

Mr. Mulliner: I think that is all.

Mr. Wilson: That is all, Mr. Estes.

The Court: I have a question.

The Witness: Yes, sir.

The Court: Did you ever receive any communication in writing from the Western Building & Loan or Mr. Sullivan or Mr. Varron before May 1, 1944, that the Western Building & Loan had accepted your offer?

A. Before May 1st? What date does that offer of purchase have?

(Testimony of H. B. Estes)

The Court: This Exhibit 6 and Exhibit 1 are—the testimony has been that they were written May 1st—

Mr. Wilson: April 1st.

The Court: April 1, 1944.

The Witness: No, sir, I never received anything in writing from them that the deal had been accepted.

The Court: At any time?

The Witness: No sir.

The Court: Did you ever receive any other information that the deal had been accepted on or before May 1, 1944, from either one of the two gentlemen mentioned or anyone else representing or pretending to represent the Western Building & Loan?

The Witness: No, sir.

The Court: You did not? [33]

The Witness: No, sir.

The Court: All right.

Q. By Mr. Mulliner: Did you receive information from Mr. Arthur to the effect that he had had a telephone call from Mr. Carron with relation to that acceptance?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial, hearsay, and not the best evidence. If your Honor please, there are two questions involved; first, the corporate act, and the evidence of the corporate act would necessarily have to be some record of somebody, either officer or Board, that he or it had accepted or rejected the offer. Then in the second place we would have the communication from that person or Board to the offerer or proposer, Mr. Estes and Mr. Arthur. Now, we are not required to take cognizance of anything—

The Court: I don't know that any communication to Mr. Arthur would be binding upon Mr. Estes anyhow.

(Testimony of H. B. Estes)

because from the testimony so far it does not appear that Mr. Arthur was the agent of Mr. Estes or that Mr. Estes was necessarily the agent of Mr. Arthur. It appears that he was a principal. This is not made as an offer of partnership.

Mr. Wilson: It is a joint offer.

The Court: It is a joint offer.

Mr. Wilson: May I just interrupt a moment? My objection to the question now as to whether he did hear from Arthur or anybody else would be merely the second step in a [34] series of steps necessary to establish the ultimate fact of an acceptance. Therefore, it would be permitted to ask, "Did you hear from Mr. Arthur thus and so?" It would be better to start at the beginning and establish the corporate act.

The Court: That might be better but lawyers don't always do things the better way. Your objection is overruled.

Mr. Mulliner: Your Honor, this is a situation—

The Court: I am ruling in your favor. The objection is overruled, unless you just want to make a speech.

Mr. Mulliner: I don't want to make a speech but I want to call your Honor's attention to something which I think is important here in connection with this cross-examination. Your Honor's question opened up a field of cross-examination.

The Court: No objection was made to it. Counsel have a right to object. Do you wish to strike it?

Mr. Mulliner: I am not criticizing your Honor.

The Court: If there is any objection I will strike it.

Mr. Mulliner: What we are contending, your Honor, so that I can make myself clear, is that it is just a matter

(Testimony of H. B. Estes)

of the order of proof and procedure here and I don't want to get myself tangled up.

Mr. Wilson: You don't need to worry about that, Mr. Mulliner. I am not technical on that.

The Court: You mean you withdraw your objection or do you objection on the ground it is immaterial?

Mr. Wilson: I don't object that it is out of order. [35] I don't care whether he starts first or last with the defense.

The Court: What is your objection?

Mr. Wilson: My objection is that it is not material. It is hearsay and the foundation has not been laid. It is not the best evidence. In other words, to establish, as I said, the acceptance by the corporation, we must have something.

The Court: I think that goes to the weight of much of the examination of this witness. The question is proper.

Mr. Mulliner: I believe, your Honor, unless I am waiving some right by not doing it, I will not cross examine with relation to your Honor's questions at this time because we will present the question of notice.

The Court: I don't think you are waiving any right. You have a right to have that question answered if you so desire. Do you withdraw it?

Mr. Mulliner: I will withdraw it without waiving my right to cross examine on this point.

The Court: Do you want to recall this witness on further cross-examination?

Mr. Mulliner: Yes, or to examine him if he—on this subject again without having waived that.

The Court: I think he is through. Did you have further questions?

(Testimony of H. B. Estes)

Mr. Wilson: No.

The Court: He is through, then. [36]

Mr. Mulliner: We expect to present this question of notice, your Honor.

The Court: I think your opportunity to cross examine him upon that question of whether he had had any oral communication is at present. If you desire to call him later I think you would probably have to call him as your own witness.

Mr. Mulliner: I will ask that the witness answer the question.

The Court: Let the reporter read it.

(The question was read as follows:

“Q. Did you receive information from Mr. Arthur to the effect that he had had a telephone call from Mr. Carron with relation to that acceptance?”)

The Court: Do you want to fix a date or not?

Mr. Mulliner: The question of the date is in controversy, your Honor.

The Court: All right. Do you understand the question?

The Witness: No, sir, I don't.

The Court: Read that over again.

(The question was again read.)

A. No, sir.

Q. By Mr. Mulliner: You did not have any conversation with Mr. Arthur on that subject at all?

A. I had a conversation with Mr. Arthur, stating that he had received a telephone call from Mr. Carron or Mr. Sullivan but he did not state that they had accepted the offer [37] to purchase.

Q. Mr. Estes, your deposition was taken in this matter, wasn't it? A. Yes, sir.

(Testimony of H. B. Estes)

Q. And who took your deposition and where?

A. It was taken in San Bernardino.

Q. And by whom? A. I don't know.

Q. The reporter, Mr. Lynde? A. Yes, sir.

Q. Do you recall being asked this question at that time—

Mr. Mulliner: I call attention, Mr. Wilson, to page 19 of this witness' deposition.

The Court: We follow the practice here of first showing it to the witness and letting him read it. Here is the original. You may use this.

Mr. Mulliner: I thought perhaps your Honor would want to look at that. I believe I have another one.

Q. By Mr. Mulliner: Will you look at the question commencing just below the middle of the page there on page 19, Mr. Estes?

A. Right here (indicating)?

Q. Yes.

The Court: Line what?

Mr. Mulliner: It is line 16, where it starts. [38]

The Witness: Yes, sir.

The Court: You have read from line 16 to where, Mr. Witness?

The Witness: Through 22.

The Court: All right. Is that what you wanted him to read?

Mr. Mulliner: Yes.

Q. By Mr. Mulliner: That question and answer as given there are correct, are they?

A. Yes, sir, this is correct here.

Q. He did tell you that he had had a conversation stating that they had accepted the deal?

A. That was after May—

(Testimony of H. B. Estes)

Q. I am just asking you if he did so say to you?

A. Yes, sir.

Q. Your recollection, you were going to say, is that that was after May 1st?

A. That was between the 5th and the 10th.

Mr. Mulliner: The question, in order to have it in the record, your Honor, is:

“At any time after the inventory was signed did Mr. Arthur tell you that he had been advised by Carron verbally that Salt Lake had accepted the offer?”

The Witness: No, sir.

Q. By Mr. Mulliner: Now, wait a minute. That is the [39] question. You are looking at it, aren't you?

A. I thought you were speaking to me.

The Court: Just a minute. He is reading, and then he will say, did you or did you not so testify.

Mr. Mulliner: (Reading)

“A. I think he told me that somewhere about—oh, between the 5th and the 10th of May, that he had a conversation stating that they had accepted the deal.”

Q. By Mr. Mulliner: Did you so testify?

A. Yes, sir.

Q. And was that correct? A. Yes, sir.

Q. The next question, just look at line 23:

“Did he tell you who he talked to?”

“A. I think it was Carron.”

Did you so testify? A. Yes, sir.

Q. And was that correct? A. Yes, sir.

The Court: I have a deposition with some corrections on that line.

Mr. Mulliner: I am not concerned about the date of it.

(Testimony of H. B. Estes)

The Court: The corrections?

Mr. Mulliner: The corrections relate to the date.

The Court: No.

Mr. Mulliner: Don't they? [40]

The Court: No. Line 24 in the original signed deposition says:

"A. I think it was Carron or it may have been Sullivan."

Q. By Mr. Mulliner: That was the way you testified to it when the reporter took it, the way I read it to you, is that not correct? A. Yes, sir.

Q. Did you later make a correction on it in pen?

A. Yes, sir.

Q. Did you do that yourself?

A. No, sir, I did not do that myself.

Q. Who did do it?

A. I think it was—I am not sure, but I think it was the man that wrote this down.

The Court: The reporter?

The Witness: Yes, sir.

Q. By Mr. Mulliner: You told him what you wanted to put here? A. Yes, sir.

Q. Notice the next question, beginning at 25:

"Did he tell you whether or not Mr. Carron had telephoned that information?

"A. I think it was telephone."

Did you so testify? A. Yes, sir.

Q. Now, come down to 14 on the next page, page 20. I [41] am reading the question:

"Q. And he told you, as I understand, that he had just received a call from Carron that Salt Lake had accepted the offer? A —"

(Testimony of H. B. Estes)

Now, I will read it as the reporter gave it first:

“A. Yes, but that information, I think, came after we had wired them—after Mr. Wilson had wired them that we rejected the deal.”

Now, did you so testify when your deposition was taken? A. Yes, sir.

Q. Afterward you had cause to have inserted there, after the first word of the answer, the words “or Sullivan?” A. Yes, sir.

Q. Do you remember the Mission Riverside deal?

A. Yes, sir.

Q. That was an apartment house sale also, was it not, in which you were one of the purchasers?

A. That is right, yes, sir.

Q. In that instance, Mr. Estes—that was handled in 1943? A. Yes, sir.

Q. Approximately a year before this deal?

A. Yes, sir.

Q. In that transaction also the acceptance by the home office was communicated to you orally, was it not? [42]

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Overruled.

A. I don't remember.

Q. By Mr. Mulliner: You have no writing showing acceptance by the home company?

Mr. Wilson: You mean on that transaction?

Mr. Mulliner: On that transaction.

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial, and not the best evidence. I happened to be in on that deal so I know something about it.

(Testimony of H. B. Estes)

The Court: I don't know what the best evidence is. He is just asking him if he had some writing. He may answer the question.

A. I don't know if I have any writing or not.

Q. You handled the Melvin Sherwood deal, did you not? A. Yes, sir.

Q. As real estate broker? A. Yes, sir.

Q. You were not a purchaser? A. No, sir.

Q. That was an apartment house deal?

A. Yes, sir.

Q. Can you tell me about when that transaction took place?

A. That was approximately, I would say, maybe six [43] months to a year previous to the Riverside Mission apartment house deal.

Q. That would be your best recollection?

A. Yes, sir.

Q. And in these apartment house deals that you had had previously, and in this apartment house deal, you had no communication except with the representatives of the sales office here in Los Angeles?

A. Yes, sir, that is right.

Q. Either Mr. Sullivan or Mr. Carron?

A. Yes, sir.

Mr. Mulliner: That is all, your Honor.

The Court: I have another question. If either side has any objection to these don't hesitate to express it. It will not offend me at all.

In response to a question on cross-examination you stated that you were in Mr. Wilson's office and he made some notes in connection with a telegram?

The Witness: Yes, sir.

(Testimony of H. B. Estes)

The Court: Is that Mr. Wilson the counsel here?

The Witness: Yes, sir.

The Court: What were you doing in his office?

The Witness: I went into his office to tell him to notify Salt Lake that we were withdrawing our offer.

The Court: Was Mr. Arthur with you?

The Witness: No, sir, I don't think he was. [44]

Mr. Mulliner: Will your Honor pardon me? I did not get a part of the witness' answer.

The Court: The reporter will read it.

(Record read.)

The Court: You consulted Mr. Wilson in a professional capacity as a lawyer in connection with this transaction?

The Witness: Yes, sir.

The Court: All right. Any other questions?

Mr. Wilson: None, your Honor.

The Court: Very well.

Q. By Mr. Mulliner: Had you consulted with Mr. Arthur about withdrawing your offer? A. Yes, sir.

Q. When you went to Mr. Wilson's office?

A. Yes, sir.

Q. Did he go with you? A. No, sir.

Q. Did he tell you to go? A. Yes, sir.

Mr. Mulliner: That is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Wilson: Your Honor, I don't know what your practice is, but this happens to be one of the instances where I would like to take the witness stand without prejudicing my [45] clients' interests, if I may, merely to

establish the execution of these documents which I had prepared for them.

The Court: You mean the telegram and the letter?

Mr. Wilson: Yes.

The Court: I don't see how you would jeopardize your clients' interests. I think probably counsel would stipulate that you prepared them.

Mr. Wilson: I tried to get them to stipulate.

The Court: Take the stand.

Mr. Mulliner: I said I would talk with you about it. I didn't know what counsel had in mind. I am perfectly willing to do that now, your Honor.

Mr. Wilson: Will you stipulate, Mr. Mulliner, that on the 8th of May—

The Court: That if Mr. Wilson were called to the witness stand he would testify that on the 8th of May—

Mr. Wilson: Will you stipulate, as stated by his Honor, that on the 8th of May I was an attorney-at-law and still am, duly licensed to practice as such, with my offices in San Bernardino, California, and that on that day I was interviewed by Mr. H. B. Estes, and at his instance I drafted the two letters which are embraced in Exhibit 3, and thereafter and on the same day the two letters were signed by Mr. Arthur and Mr. Estes, respectively—

The Court: In your presence?

Mr. Wilson: In my presence. —and were thereupon [46] mailed by me to the addressees thereupon set forth respectively, and the contents of the letters were then sent by me on the same day as evidenced by the two documents, Exhibit 2?

The Court: By telegram?

Mr. Wilson: By telegram. In other words, the letter was transmitted by mail and also by telegram.

Mr. Mulliner: That is, if you were a witness you would so testify?

Mr. Wilson: Yes.

Mr. Mulliner: May we add to that also that these purported telegrams were night letters?

Mr. Wilson: Yes, your Honor, sent as night letters.

Mr. Mulliner: And that on the one in Exhibit 2 that was sent to the Western Loan at 308 West Olympic Boulevard, it was received in Los Angeles at 10:13 P. M. on the night of May 8th?

The Court: Whatever the telegraph record shows. That is presumptively correct.

Mr. Mulliner: That date is on here and they advised my associate, Mr. Perelli-Minetti, that that is what that date means. We have checked it.

Mr. Wilson: I will so stipulate.

The Court: All right.

Mr. Mulliner: And, that being a night letter, of course, Mr. Wilson, we can stipulate it would naturally be communicated the next morning?

The Court: I don't know about that. If you want to [47] stipulate, all right, but I don't know about that.

Mr. Wilson: I will so stipulate.

Mr. Mulliner: He says he will so stipulate.

The Court: All right.

Mr. Mulliner: The one that was addressed to the Building and Loan Company at Salt Lake City, Utah, was received at Salt Lake May 9th at 4:13.

Mr. Wilson: A. M.?

Mr. Mulliner: 4:13 A. M., and that was also a night letter.

Mr. Wilson: Yes.

Mr. Mulliner: Which would not be communicated until—

Mr. Wilson: That morning.

Mr. Mulliner: Until the day of the 9th.

Mr. Wilson: That is right.

Mr. Mulliner: On the letters here, Mr. Wilson, we have a system up in Salt Lake where our mail clerk stamps the receipt date on the letter. Can we stipulate—it is not so clear—that that is the receiving stamp of the Western Building & Loan Company at Salt Lake?

The Court: And that if the clerk were here to testify, he would testify it was placed on there on or about the date it bears? Is that the offer of your stipulation?

Mr. Mulliner: Yes, your Honor.

Mr. Wilson: I will stipulate he would so testify, but I cannot understand why it would take three days to get a [48] letter from San Bernardino to Salt Lake.

Mr. Mulliner: It does sometimes, especially if they happen to go out at night.

The Court: There are lots of things you are not supposed to understand these days. We have had them take a week to get from here to Fifth and Broadway.

Mr. Mulliner: I am somewhat in your position, I can testify to their practice because I have watched it many times.

Can we stipulate that on Exhibit 3, the part of that exhibit referring to the letter addressed to the Salt Lake City office, that the stamp in the lower right-hand corner is the receiving stamp of Western Loan & Building Company placed on it at its office in Salt Lake, indicating the time it was received there?

Mr. Wilson: So stipulated.

The Court: All right.

Mr. Mulliner: And that the mail clerk there, if she were called to testify, would testify that it was put on immediately when the letter was opened in the office?

Mr. Wilson: So stipulated.

Mr. Mulliner: They don't have a stamp at the Olympic Boulevard office here in Los Angeles, but I am told, Mr. Wilson, that that is the handwriting of the girl in the office as to the time of receipt of that letter.

The Court: Well, you have somebody in the office here who will probably be on the stand, or do you want to stipulate [49] to it?

Mr. Mulliner: This girl will so testify if she is called.

Mr. Wilson: We will stipulate she would so testify.

The Court: All right.

Mr. Mulliner: I have not so stated, but we agree to so stipulate so far, your Honor.

The Court: Very well.

Mr. Mulliner: Here is something, Mr. Wilson. It is probably not important. We had it explained to us and we may as well stipulate to it. We have already stipulated that the telegram to the Los Angeles office was received at 10:13 that night and would not be delivered until the next day. Down at the bottom there is a stamp on it, "FJ, 921." I understand that that 921 means that it was telephoned to Mr. Sullivan, whose name is given there, at 9:21 of the morning of the 9th, and at that time mailed, and that it was received at the office through the mail on May 10th.

Mr. Wilson: So stipulated.

The Court: Very well. Next witness.

Mr. Wilson: Mr. Arthur.

ALBERT C. ARTHUR,

called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination.

The Clerk: State your name. [50]

The Witness: Albert C. Arthur.

The Clerk: And your address?

The Witness: California Hotel, San Bernardino.

Q. By Mr. Wilson: Mr. Arthur, you are the plaintiff, or one of the plaintiffs, in this law suit?

A. Yes, sir.

Q. What is your business? A. Retail jeweler.

Q. A little louder. A. Retail Jeweler.

Q. Where?

A. San Bernardino and Huntington Park.

Q. How long have you been in that business in San Bernardino? A. Since 1927.

Q. And you still are? A. Yes, sir.

Q. Do you know the co-plaintiff, H. B. Estes?

A. Yes, sir.

Q. For a number of years you knew him as a real estate broker in San Bernardino? A. Yes, sir.

Q. Do you remember when it was that Mr. Estes first endeavored to interest you in the purchase of the Norman Manor Apartments?

A. In the first part of last year. [51]

Q. You will observe before you Exhibits 1 and 6; do they bear your signature? A. Yes, sir.

Q. Do you observe on them that the date of execution apparently is April 1, 1944? A. Yes, sir.

(Testimony of Albert C. Arthur)

Q. With relation to that date, can you fix more definitely when you were first being solicited by Mr. Estes in connection with the purchase of this property?

A. We had talked over the property two or three months previous to this time.

Q. Do you remember when with relation to April 1st you made him a proposition and fixed a price?

Mr. Mulliner: I don't see that that is material. I will object to it as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. By Mr. Wilson: During the time that you were being solicited by Mr. Estes, was there any conversation relative to the asking price as set forth in any prospectus?

A. The prospectus was given to us.

Q. You mean you saw a prospectus?

A. Yes, sir.

Q. In which a price was specified? A. Yes, sir.

Q. Do you remember what the prospectus revealed with respect to the price? [52]

A. I don't remember the exact amount.

Q. You will observe, as I said, that Exhibits 1 and 6 bear your signature. Do you remember when and where you signed those documents?

A. Yes, sir. They were signed at the California Hotel.

Q. With relation to April 1st when were they signed?

A. They were signed on April 1st.

Q. Do you recall whether or not they were prepared other than the signatures prior to the time that you met in the California Hotel?

A. They were completely prepared when they were brought to the California Hotel and offered there.

(Testimony of Albert C. Arthur)

Q. By whom?

A. Mr. Carron and Mr. Sullivan.

Q. And those are the two men whom you have identified as representatives of the defendant in some capacity or other, is that right?

A. Yes, sir.

Q. Well, when the documents were presented to you did you examine the back side of Exhibit 6?

Mr. Mulliner: I will object to that as incompetent, irrelevant, and immaterial.

The Court: Overruled.

Q. By Mr. Wilson: That is, the blue one.

A. I don't recall. [53]

Q. Was the subject of Mr. Estes' commission discussed at this meeting at the California Hotel when these documents were signed?

A. Yes, sir.

Q. What do you recall was said at that time about this commission?

A. Well, the commission had been previously arranged between Mr. Sullivan and Mr. Carron and Mr. Estes. It was known to me at the time this deal was being made.

Q. Was there anything said—

The Court: Known to you to be what?

The Witness: \$4,000.

Q. By Mr. Wilson: Was anything said at that time about the commission other than what you have now revealed?

A. I don't recall anything regarding—you mean as far as this deal?

The Court: Yes, as far as this deal is concerned. This is all we are concerned with.

Mr. Wilson: Yes.

The Witness: Maybe I can explain in my words instead of answering your question. These figures were

(Testimony of Albert C. Arthur)

brought to me at the California Hotel, to either accept or reject, as far as sending in a request for an offer to the Salt Lake office. They asked me to read these, and if they were satisfactory they had a rubber stamp on here which I was to sign that I read them, and submit that offer to the Salt Lake office. [54]

The Court: That was another paper?

The Witness: This paper.

The Court: Oh, that paper there?

The Witness: Yes, sir.

Q. By Mr. Wilson: When you say the California Hotel, do you mean your apartment there?

A. No, the lobby of the California Hotel.

Q. On what basis were you and Mr. Estes operating in connection with the acquisition or purported acquisition of this property?

Mr. Mulliner: I will object to that as calling for the conclusion of the witness and irrelevant and immaterial.

The Court: Sustained.

A. You mean the—

Mr. Wilson: Wait a minute.

The Court: The objection to the question was sustained and that means that you are not to answer.

Q. By Mr. Wilson: At the bottom of Exhibit A for Identification you will observe in pencil a notation, "R. E.—4427—30. N. Manor and Annex." Was that notation on there when you delivered it to the person to whom you did give it? A. No, sir.

The Court: To whom did you give it?

The Witness: I gave the check to Mr. Sullivan and Mr. Carron. They were both there together.

(Testimony of Albert C. Arthur)

Q. By Mr. Wilson: And did you give it to them at the [55] time of this conference when these writings were signed on April 1st? A. Yes, sir.

Mr. Wilson: That is all.

Cross-Examination.

Q. By Mr. Mulliner: In addition to your jewelry business, do you operate real estate?

A. Yes, sir.

Q. Are you associated with Mr. Estes in the real estate operations? A. Yes, sir.

Q. Before these papers were prepared had you indicated that the price of \$86,750 would be satisfactory to you? A. Yes, sir.

Q. Reference was made by you, Mr. Arthur, to a rubber stamp on Exhibits 1 and 6, which I think you have in front of you. A. Yes, sir.

Q. By that you referred to the stamp reciting, "I have read the deed of trust and note, and they are satisfactory?" A. Yes, sir.

Q. That is the deed of trust that was to be subsequently executed as referred to in the instrument?

A. Those were to be brought to escrow.

The Court: What is that?

Mr. Mulliner: Those were to be brought to escrow.
[56]

The Court: You didn't see them then?

The Witness: They had just this one sheet of which they had I don't know how many copies.

The Court: You didn't see the deed of trust or the note?

The Witness: That had to be brought to escrow.

(Testimony of Albert C. Arthur)

The Court: Did you see it? You say it was to be brought to escrow?

The Witness: No, sir.

Q. By Mr. Mulliner: Did you initial this?

A. Yes, sir.

Q. That recites that you had examined it, doesn't it? And is that Mr. Estes' initials also? A. Yes, sir.

Q. Now, as a matter of fact, the trust deed was there at that time?

A. This is the only paper that was there.

Q. Why did you sign this rubber stamp notation that you referred to, that you had seen the deed of trust, if you had not seen it?

A. I just took their word that it would be in escrow.

Q. Do you mean by that you left the matter largely to Mr. Estes, he being a real estate broker, as to the forms of the subsequent papers?

A. Well, there was no other papers signed and the subsequent papers would have to come through escrow.

Q. That is true, but as to the form of what you were [57] going to execute subsequently to go into escrow, did you leave that up to Mr. Estes?

A. State your question again, please.

The Court: The reporter will read it.

(Question read.)

A. No. I signed an offer to purchase and the papers would be in escrow after they would be returned from Salt Lake.

Q. By Mr. Mulliner: Now, just look at that rubber stamp notation there. A. Yes, sir.

Q. And to your initials on there. You know the instrument that that refers to, don't you, the rubber stamp there? A. The offer to purchase.

(Testimony of Albert C. Arthur)

Q. Yes, but the instrument itself refers to a trust deed to be subsequently executed to secure the balance of this purchase price?

A. I was instructed by Mr. Carron and Mr. Sullivan that that could not be made out until it was put in escrow because all I could do would be to submit an offer to Salt Lake and they would have to give a decision.

Q. All right. All I am referring to is what you meant when you initialed this rubber stamp. You made reference to it in your testimony. This says that you have seen the trust deed and the trust note. Now, this recites in here that there [58] will be \$21,000 paid on this, and \$65,750 will be secured by a trust deed. Do you recall that?

A. I recall this whole sheet. It is still only tentative, it is no deal.

Mr. Mulliner: I ask that that go out, your Honor.

The Court: It may be stricken.

Q. By Mr. Mulliner: You have answered me that you don't recall seeing the trust deed there?

A. That is right.

Q. That was to be executed subsequently?

The Court: He has answered that he was positive he did not see it.

Mr. Mulliner: I think that is right.

The Witness: That is right.

Q. By Mr. Mulliner: Notwithstanding that, you signed this anyway? A. Yes, sir.

Q. That you had seen it? Correct?

A. Yes, sir.

(Testimony of Albert C. Arthur)

Q. When Exhibit 1 was signed, and, of course, also Exhibit 6, I assume they were signed at the same time, and Mr. Sullivan and Mr. Carron were both there?

A. Yes, sir.

Q. You are pretty sure about that?

A. I am positive of it.

Q. You are positive? [59] A. Yes, sir.

Q. They both brought these documents completed, ready for execution? A. Yes, sir.

Q. They brought them at that time to the lobby, I think you said, of the hotel?

A. The California Hotel.

Mr. Mulliner: That is all, your Honor.

The Court: Any redirect?

Mr. Wilson: Yes, if your Honor please.

Redirect Examination.

Q. By Mr. Wilson: You say you are in the jewelry business, Mr. Arthur? A. Yes, sir.

Q. To what extent are you in the real estate business?

A. Well, I have a park in San Bernardino.

Mr. Mulliner: A what?

The Witness: A park, a recreation park.

Q. By Mr. Wilson: You mean the Pickering Park?

A. That is right.

The Court: What do you do, buy and sell real estate in your own name? Is that it? Do you buy for your own account or do you act as a broker or agent?

The Witness: No, no broker or agent. I have a couple of pieces of property of my own, income property.

The Court: I see. [60]

Q. By Mr. Wilson: When you said you were associated with Mr. Estes in real estate operations, you meant

(Testimony of Albert C. Arthur)

by that that you and he had together bought several pieces of property as co-owners? A. Yes, sir.

Q. And is that as far as your association with him in the real estate business has extended? A. Yes, sir.

Q. As a matter of fact, your entire time is devoted to the jewelry business except as it may be incidentally required to advise as to what he might do in connection with the operation of your jointly-owned property?

A. That is right.

Q. How much jointly-owned properties do you and he now possess? A. Now?

Q. Yes. A. None.

Mr. Mulliner: What was that?

The Court: None, he said.

Q. By Mr. Wilson: On April 1, 1944, did you and he own any properties together? A. Yes, sir.

Q. How many? A. Two.

The Court: What is the difference? I sustained an [61] objection to this line of questioning before **but you** didn't make one when he asked it on cross examination.

Mr. Wilson: That is all, your Honor.

The Court: Did you ever receive any written communication from the Western Loan & Building or Mr. Carron or Mr. Sullivan on or before May 1, 1944, that they had accepted or rejected the offer contained in Exhibit 1 and Exhibit 6?

The Witness: No, sir.

Mr. Mulliner: Your Honor—

The Court: Well, I will strike it if you wish.

Mr. Mulliner: Of course, it is our position, if your Honor will permit me, that this does not depend on a **written** communication of acceptance.

(Testimony of Albert C. Arthur)

The Court: I just asked if he had received one. You can develop any other kind of communication. I was going to ask him the same question I asked of Mr. Estes.

Did you receive any oral communication from Mr. Carron or Mr. Sullivan or any other person representing or claiming that they represented the Western Building and Loan on or before May 1, 1944, advising you that your offer was accepted?

The Witness: No, sir.

Mr. Wilson: That is the Western Loan & Building Company, your Honor.

The Court: Whatever it is. You knew who I meant, didn't you.

The Witness: Yes, sir. [62]

The Court: All right.

Recross Examination

Q. By Mr. Mulliner: Did you receive any oral communication that Western Loan & Building Company had accepted the proposition?

The Court: You mean at any time?

Mr. Mulliner: Yes.

A. I received a telephone call from Mr. Sullivan stating that—

The Court: When?

The Witness: On May 9th.

Q. By Mr. Mulliner: Was that the only communication that you received?

A. That is the only one relative to any acceptance of the deal.

(Testimony of Albert C. Arthur)

Q. And you say that was after May 1st, and, in fact, May 9th? A. Yes, sir.

Q. But, anyway, you did receive such a communication? A. Yes, sir.

Mr. Mulliner: I think that is all.

Mr. Wilson: That is all, Mr. Arthur.

The Court: You may step down.

(Witness excused.)

Mr. Wilson: The plaintiff rests.

Mr. Mulliner: I assume that in your Honor's practice if [63] we make a motion at this time we do not waive our right to put in evidence afterward?

The Court: Oh, no.

Mr. Mulliner: At this time, your Honor, we move for a non-suit and dismissal of the case at this time upon the ground that the plaintiffs have not made out a *prima facie* case and that their evidence is insufficient to sustain the allegations of their complaint.

The Court: On what basis? For the purpose of the record?

Mr. Mulliner: No. (After consultation.) I think, your Honor, in view of the condition of the record at this time that we will merely submit the motion.

The Court: Motion denied. We proceeded without any recess and I think we might therefore recess until 2:00 o'clock. You will be able to finish this afternoon with your testimony?

Mr. Mulliner: I would think so, your Honor.

The Court: Very well.

(Whereupon a recess was taken until 2:00 o'clock P.M. of the same day.) [64]

Afternoon Session

2:00 O'Clock

The Court: Proceed.

Mr. Mulliner: Mr. Carron, will you be sworn?

Shall I swear the witnesses all at once or one at a time?

The Court: One at a time.

JAMES CARRON,

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. James Carron.

The Clerk: And your address?

A. 2702 Collier Avenue, San Diego, California.

Direct Examination

Q. By Mr. Mulliner: Mr. Carron, where do you live at this time? A. I live in San Diego.

Q. By whom are you employed?

A. I am employed by the Alcohol Products Corporation.

Q. In the period embracing April of 1944 and for some time prior thereto, by whom were you employed?

A. By the Western Loan & Building Company.

Q. Tell us when you started to work for Western Loan. A. I commenced on February 1, 1942. [65]

Q. Did you work for them continuously up until April of 1944? A. Correction; May, 1944.

Q. Well, through April?

A. Through April, yes, sir.

(Testimony of James Carron)

Q. In what capacity?

A. As a salesman, real estate salesman.

Q. In what office?

A. In the Los Angeles office.

Q. Where is that located?

A. 208 West Olympic Boulevard.

Q. Were you working under anybody in that department? . A. Yes. I was working under Mr. Sullivan.

Q. And what was his capacity?

A. Mr. Sullivan was the sales manager for the company.

Q. Now, coming to April 1, 1944, and this apartment house that is involved here, had you discussed that matter previously with anyone connected with this case?

A. Previous to—

Q. April 1, 1944? A. Yes, I had.

Q. With whom?

A. Oh, with various brokers and interested buyers.

Q. I mean, connected with this case.

A. No, not connected with the case except people in our own office. [66]

Q. *Has* you discussed it with Mr. Estes or Mr. Arthur? A. After that date, did you say?

The Court: Before April 1st.

The Witness: Before April 1st? Yes, I discussed it with them.

Q. By Mr. Mulliner: How long had you known Mr. Arthur? A. Oh, approximately 10 years.

Q. And how long had you known Mr. Estes?

A. About two years.

(Testimony of James Carron)

Q. In your capacity with the Western Loan had you had other business transactions with either of them?

A. No completed deals. I had negotiated with them on other properties.

Q. I don't mean with relation to this property; I mean on any properties had you had any dealings with Mr. Estes? A. Yes.

The Court: Completed deals?

The Witness: No, sir, that is, not by myself, but with Mr. Sullivan one completed deal, Mission and Riverside.

Q. By Mr. Mulliner: There were two other apartment house deals that were mentioned this morning. You worked on those, did you not? A. Yes, sir.

Q. Now, coming to this contract, Exhibit 1, of April 1, 1944, did you see these parties, these plaintiffs, at that time on that date? [67] A. On that date? Yes, sir.

Q. What was the occasion of your seeing them?

A. To draw up this offer to purchase and to obtain their signatures.

Q. On that occasion did you go from the office here directly to San Bernardino?

A. Not on that day. I went to San Bernardino first, went on down to Calexico, and had this offer signed up on my way back on April 1st.

Q. That is what I was getting at. You were coming back from— A. From Calexico.

Q. And how long had you been down there?

A. The greater part of two days.

Q. Which one of these parties did you see first when you got to San Bernardino? A. Mr. Estes.

Q. And where did you see him?

A. Oh, as I recall it, I met Mr. Estes in the California Hotel.

(Testimony of James Carron)

Q. And did you do anything at that time with reference to drawing up this contract, Exhibits 1 and 7?

The Court: 6.

Mr. Mulliner: 6, yes. I keep calling that 7.

A. Yes.

Q. By Mr. Mulliner: What did you and Mr. Estes do in [68] relation to that?

A. I went with Mr. Estes in his car up to his home.

Q. Did you have these documents with you?

A. Yes, sir.

Q. Were they in their completed form at that time?

A. No, they were not.

Q. Had anything been done on them? A. Yes.

Q. And where was the first work done on them?

A. The first work was done in my office in Los Angeles here.

Q. And was that before you went to Calexico?

A. Yes, sir.

Q. Now, I wish you would refer to that—tell me, first, where were they completed except for the signing?

A. They were completed in Mr. Estes' home in San Bernardino.

Q. And who was present there? A. Mr. Estes, Mrs. Estes, and myself.

Q. Any typing work done? A. Yes, sir.

Q. Who did that? A. Mrs. Estes.

Q. I wish you would take that Exhibit 6 there, if you can, Mr. Carron, and just—

The Court: Let me see Exhibit 1 while he is doing that. [69]

Mr. Mulliner: I was just going to hand it to your Honor.

(Testimony of James Carron)

Q. By Mr. Mulliner: (Continuing) —and tell us what portion of that was filled out in your office here before you left and what portion was added after your discussion with Mr. Estes out there at San Bernardino.

Mr. Wilson: That is objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: I think it has some bearing on this matter, your Honor.

The Court: I think that it is admissible only to show the credibility of the witness Estes. That is the only ground upon which I can see its materiality and its admissibility.

Q. By Mr. Mulliner: You may proceed.

A. Will you repeat the question, please?

The Court: What was typed in by Mrs. Estes? That is what he wants to know.

Mr. Wilson: Pardon me. May I have the question read?

(Question read.)

The Court: The record should show that the exhibit is on a printed form. In the first place, all the printing was on it when you went to see Mr. Estes?

The Witness: Yes, sir.

Q. By Mr. Mulliner: These are printed forms that you had used for a considerable period of time?

A. Yes, sir. [70]

Q. How long a time?

A. Ever since I was with the company.

Q. All right. Now, proceed, if you will.

The Court: Begin at the top there, "Lots 13, 14, 15", two lines of typing.

A. The legal description was typed in in my office here in Los Angeles, that is, those two lines of copy.

(Testimony of James Carron)

The printed form, of course, remains the same. The date of May 1st, 1944, was typed in out in Mr. Estes' home. The real estate property number, 4427-4430, San Bernardino, San Bernardino County, California, and the next line had been typed in in my office here.

The Court: That is, the property number **and street** address?

The Witness: Yes.

The Court: The name and address of the purchaser on the next two lines?

The Witness: That was typed in out at Mr. Estes' home, on down to and including "Grant deed to be taken in name of Albert C. Arthur", and so forth, that was typed in out at Mr. Estes' home. The sale plan, "Deed of trust", was typed in in my office. The sale price, amount of cash, balance of, was typed in out at Mr. Estes' home. In the second line down the figure of \$591.75 was typed in at Mr. Estes' home.

The Court: The rest of the typing up to that you typed in? [71]

The Witness: Yes, sir. May 16, 1944, in light type, was typed in at Mr. Estes' home. Then on down to that with relation to the fire insurance premium, that figure of \$65,750 was typed in at Mr. Estes' home. Then that "Purchaser to have the privilege of paying—"

Q. By Mr. Mulliner: Just a minute, before you get there; from that figure that you just gave, those next two sentences down to the word "utilities"—

A. That was typed in in our office here.

The Court: In other words, everything beginning with "in monthly installments" in typing following the words "Balance of \$65,750 to be paid in the following manner",

(Testimony of James Carron)

from there down to and including the words "also public utilities", excepting the "591.75" and "May 16, 1944" and the figure of "\$65,750", was typed in in your office?

The Witness: Yes, sir.

The Court: Beginning now with "Purchaser", that next sentence?

The Witness: Beginning with "Purchaser to have the privilege of paying the entire balance, if any, at the end of 120 months—"

The Court: That is not the way mine reads.

The Witness: This is the fourth copy.

The Court (Reading:)

"Purchaser to have the privilege of paying an additional sum of \$4,931.25 in any one calendar year and also the [72] privilege of paying the entire balance, if any, at the end of 120 months from date of close of escrow."

The Witness: That was typed in at Mr. Estes' home.

The Court: All right. The closing date?

The Witness: Closing date, May 15, 1944, was typed in at Mr. Estes' home. Insurance to be prorated, taxes to be paid by owner, assessments to be paid by owner, all of that was typed in in my office here.

Q. By Mr. Mulliner: That is, all the typing below May 15, 1944, down to the signatures? A. Yes, sir.

The Court: What about the figures?

The Witness: The figures, "Received the sum of \$4,-337.50 as deposit", that was typed in at Mr. Estes' home.

Q. By Mr. Mulliner: Going on the back of it—

The Court: And the date, April 1st, 1944?

The Witness: Also the date of April 1st, 1944, that was typed in at Mr. Estes' home.

(Testimony of James Carron)

On the back, down to the figure pertaining to the commission percentage, "amounting to", the figure of \$4,000 was typed in at Mr. Estes' home. "How payable? At close of escrow", was also typed in there. "Payable to what person or firm? H. B. Estes, 386 Highland Avenue, San Bernardino, California", was also typed in at Mr. Estes' home.

Q. By Mr. Mulliner: Those matters that were typed in at Mr. Estes' office, were those matters that were discussed [73] while you were out there? A. Yes, sir.

Q. Prior to the typing? A. Yes, sir.

Q. And why were they left blank until that time?

A. They were left blank because we had not arrived at these figures until I discussed it with Mr. Estes.

Q. Now, he has stated that he made you an offer of \$86,750. I assume that that is correct?

A. That is correct.

Q. And did you at that time also discuss his commission? A. Yes, sir.

The Court: By the way, was that the first time you had ever arrived at that figure of \$86,750 as an offer?

The Witness: As I recall it, that was the first time we arrived at that figure.

The Court: I see.

Q. By Mr. Mulliner: Had you previously discussed other figures? A. Yes.

Q. I will ask you another question. I don't know whether your answer got in the record. Did you also discuss this question of the commission on the back page at that time? A. Yes, sir, we did.

(Testimony of James Carron)

Q. Was there any discussion that you recall there about reducing the price or reducing the commission? [74]

A. Yes, there was some discussion along that line.

Q. What do you recall was said?

A. As I recall, Mr. Estes said that he felt that he should have a full 5 per cent on the purchase price, and we finally compromised on a figure of \$4,000, and he stated at the time that he was reducing it to \$4,000.

Q. That made net to the company of how much?

A. I will have to figure that.

Q. No, you don't have to do that.

The Court: Did you execute this document?

The Witness: Did I execute it?

The Court: Sign it for the Western Building & Loan?

The Witness: No, sir, that was not the procedure. We did not sign those.

The Court: Did you ever sign anything and give it to him?

The Witness: Along this line here? No, I didn't sign anything.

The Court: What did you say to him about what you would do with it?

The Witness: On this offer to purchase?

The Court: Yes.

The Witness: At the time I obtained their signatures on it I told them it would be forwarded to Salt Lake for acceptance or rejection and that they would be notified a little later on, as soon as we got word. [75]

The Court: Why to Salt Lake?

The Witness: Because all these offers had to go to Salt Lake.

The Court: Is that the head office?

(Testimony of James Carron)

The Witness: Yes, sir. May I correct that? The offer went from my office to Mr. Sullivan's office in Oakland and then was sent to Salt Lake.

The Court: Is that what you told them?

The Witness: I wouldn't swear that I told them that, but Mr. Estes—

The Court: You did tell them it had to go to Salt Lake?

The Witness: I did tell them it had to go to Salt Lake, yes, sir.

The Court: Did you say anything about your authority to accept it or not accept it, or was anything said about it?

The Witness: Well, I presumed that—I could not accept it. I don't know if we had a discussion along that line, because Mr. Estes had had dealings with us before and he knew that I did not have authority to accept the deal.

Q. By Mr. Mulliner: I show you what have been marked here as Exhibits 4 and 5. Perhaps you better tell us what that No. 4 is. What do you call it?

A. We call it a listing.

Q. What did you use it for? A. Well, we used it for brokers to use in attempting [76] to sell the properties, and occasionally a buyer. It would be given to a buyer to give him the information that he would want to know about a particular apartment house, the price, the terms, the number of units, the expenses.

Q. I have not looked at that. Does that contain a statement of earnings, expenses, and so on?

A. This one here on the second page.

(Testimony of James Carron)

Q. The next one, Exhibit 5, is that a document of the same character? A. Yes, sir.

Q. It is perhaps not a single document; it is two or three pages, isn't it? A. It is two pages.

Q. That is used for the same purpose?

A. Yes, sir.

Q. That apparently was a couple of years later than the other one? A. Yes, sir.

Q. Now, were those gotten out for this particular deal or for this particular broker, Mr. Estes?

A. No, this was not gotten out just for him.

Q. Well, whom were they gotten out for?

A. They were gotten out to be used with any broker who might have a client for an apartment house building and these were given to them to help them sell the property.

Q. You stated about giving them to prospective [77] purchasers. Did you send them to the brokers in the neighborhood of the properties? A. Yes.

Q. Did you deliver any of them to brokers in Los Angeles here?

A. Not to my knowledge. Occasionally we may have, but as a general rule a Los Angeles broker would not be interested in a property out in San Bernardino. If they inquired, if they said they had a client for property in San Bernardino, we would give them this listing.

Q. Is that what you call it, a listing?

A. Yes, sir.

Q. It is not technically a listing, is it? I listing is when you sign it—

Mr. Wilson: I object to it as immaterial and argumentative.

(Testimony of James Carron)

The Court: Sustained. That provides for the payment of commissions, does it?

The Witness: Yes, sir.

Q. By Mr. Mulliner: Now, after you had finished this instrument, Exhibit 1, what did you do? Did you have any communication with Mr. Arthur? Let us put it that way.

A. After we completed the signing of the offer to purchase?

Q. Before you got it signed, after you completed it at Mr. Estes' home. [78]

A. Yes, we had quite a bit of discussion about it.

The Court: With Mr. Arthur?

The Witness: With Mr. Arthur.

Q. By Mr. Mulliner: How did you contact Mr. Arthur?

A. Well, Mr. Arthur either was at the hotel when Estes and I went back there or he came later, but I don't recall which. But all three of us met together in the lobby.

Q. And you discussed it there, did you?

A. Yes, sir.

Q. And was it signed there? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. I notice on there a rubber stamp. Was that initialed in your presence? A. Yes, sir.

Q. Anything said about the document referred to in that rubber stamp, or the documents?

A. Relative to the deed of trust and the note?

Q. Yes.

A. Yes, there was some discussion along that line.

(Testimony of James Carron)

Q. What was said?

A. As I recall it, I stated that I carried with me in my brief case a copy of our trust deed note and a copy of our trust deed and that if they wanted to read those documents they were privileged to do so because they were [79] signing and stating or initialing that they had read them, and that they were available there for them to read if they so wished.

Q. Do you recall whether either of them read them or not? A. I don't believe they did.

Q. Now, do you know of your own knowledge whether or not Mr. Estes had seen those documents previously, that is, the trust deed and the trust note?

A. In view of the fact that he had acted as broker on other Western Loan & Building properties I assume that he had seen them.

The Court: The answer may be stricken.

Q. By Mr. Mulliner: Had they been used by him in any deal in which he was a purchaser?

Mr. Wilson: That is objected to as incompetent, irrelevant, and immaterial, your Honor.

The Court: Sustained.

Q. By Mr. Mulliner: What did you do with reference to this transaction after the signing? What was the next step that you took?

A. As I recall it, I got in my car and came back to Los Angeles.

Q. What did you do by way of forwarding this deal?

A. As I recall, I forwarded the Salt Lake office copy—we kept one copy of the two and I sent one copy to Mr. Sullivan and held the other copy in our office here in Los [80] Angeles.

(Testimony of James Carron)

Q. That is what I was asking, whether or not you took it up to get Mr. Sullivan's approval.

A. It was sent to Mr. Sullivan.

Q. And did you get it?

A. Did I get Mr. Sullivan's approval?

Q. Yes. A. Yes.

Mr. Wilson. Wait a minute. I move to strike that out on the ground it is incompetent, irrelevant, and immaterial. No foundation has been laid for it.

The Court: Sustained. It may be stricken.

Mr. Mulliner: You mean you would like to have the document?

The Court: There has been no foundation laid.

Q. By Mr. Mulliner: Well, what happened after you took it up with Mr. Sullivan?

A. Well, as I recall it, Mr. Sullivan approved it.

Mr. Wilson: I move to strike out the answer on the ground it is incompetent, irrelevant, and immaterial.

The Court: It may be stricken.

Q. By Mr. Mulliner: Where was Mr. Sullivan's office? A. In Oakland.

Mr. Mulliner: Will you mark this?

The Clerk: Exhibit B for Identification.

The Court: Do you want to show the document to counsel [81] before you exhibit it to the witness?

M. Mulliner: Yes (handing). I may say for the record it purports to be a letter from Mr. Sullivan.

Mr. Wilson: (After examining.) If your Honor please, we object to any interrogation relative to a communication between the several representatives of the defendant upon the ground that the same is incompetent, irrelevant and immaterial, and no foundation laid for it,

(Testimony of James Carron)

and it is altogether hearsay. It seems to me, in just a brief explanation of the basis of my position, that we have now the things that transpired on the 1st of April—

The Court: I don't think you need to explain it. Your objection is good.

Mr. Wilson: Thank you.

The Court: Objection sustained.

Mr. Mulliner: I would like, just for the record, to offer it, your Honor, without being offensive as to your Honor's ruling.

The Court: You don't need to worry about being offensive. I practice at law and I know what lawyers figure on.

Mr. Mulliner: I have to figure, your Honor, that the steps that were necessarily taken in this thing and the people that were involved in the appraisals and things, bear upon this question as to the liquidated damages here and the question under the statute as to whether they were things that it was practical to separate and keep track of for the purpose of [82] assessing actual damages. That is why I was proceeding to show the steps that were taken.

The Court: This is a document which is of a different nature than what I had anticipated. Your question to this witness indicated to me that this was a letter approving this, from Mr. Sullivan. The document does not appear to be of that nature at all.

Mr. Wilson: I object upon the grounds previously stated, your Honor.

M. Mulliner: It has to do with these appraisals and investigations and things that are referred to in the document in connection with this deposit.

(Testimony of James Carron)

Mr. Wilson: And not within the issues of the case.

The Court: Yes, I think it is within the issues of their special defense, which is deemed to be denied by the plaintiffs, but even at that I don't know that this would be admissible—I believe that it probably would be admissible and the objection is sustained so far as the general purposes of the document are concerned, and is overruled in so far as it pertains to the special defense of the defendants and it will be—there is no foundation laid for it so I cannot admit it, but you can interrogate the witness about it.

M. Mulliner: I don't know whether he knows that signature that is on there or not. I will ask him.

Q. By Mr. Mulliner: Tell me, Mr. Carron, do you know that signature? [83]

A. (After examining) This signature here?

Q. Yes. A. Yes, I know it.

The Court: Did you receive that document?

The Witness: Yes, I did.

Q. By Mr. Mulliner: You received it in the mail?

A. Yes, sir.

Q. At the Los Angeles office? A. Yes, sir.

Q. Do you know who signed the name there, F. E. Sullivan?

A. It is initialed J.W., which I would take to be Jane Wood, Mr. Sullivan's secretary.

Q. At what office? A. At the Oakland office.

Mr. Mulliner: I don't know whether that foundation is sufficient or not. Perhaps I better have Mr. Sullivan on before I make any—

The Court: I think it is sufficient to get the document introduced.

(Testimony of James Carron)

Q. By Mr. Mulliner: That document refers to inspections—

The Court: What is the date of that document? [84]

Mr. Mulliner: Exhibit B, April 4, 1944.

Q. By Mr. Mulliner: Did you do anything with reference to that?

Mr. Wilson: Wait just a minute. That is objected to on the ground it is incompetent, irrelevant, and immaterial; no foundation laid for it.

Mr. Mulliner: We offer it upon the same theory, your Honor, as to the deal.

The Court: The objection is overruled. The objection is sustained generally, and overruled so far as the particular special defense is concerned and it is admitted for that limited purpose. You may answer the question.

The Witness: May I have the question again?

(Question read.)

A. Yes. Relative to inspections. I contacted or attempted to contact two appraisers and asked them to go out to the property and to make appraisals on it.

Q. By Mr. Mulliner: And who were those appraisers?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial. No foundation has been laid for it. If your Honor please, I believe in the interests of time, and with your forbearance, I would like to read a little bit from one of the cases and then state my position, and then if your Honor does not agree with me in my theory you can admit the evidence without further difficulty, but I anticipate this might be a matter of interrogation of some length. The theory [85] of the—

(Testimony of James Carron)

The Court: Let me examine the answer again on the special defense. (After examining.) I was under the impression that a separate defense was claimed for this sum of money as liquidated damages. You don't make that claim in your pleadings at all.

Mr. Mulliner: And neither does the other side, your Honor.

The Court: They don't claim, naturally, that it is liquidated damages; they claim they are entitled to the money.

Mr. Mulliner: They don't claim that it is not; that is my point.

The Court: I don't believe that it would be necessary for them to do that. They sue for money had and received. Then if you claim that it is liquidated damages, it would seem to me that it would be necessary for you to set that up in your defense by way of a special defense.

For a separate second and further defense you refer to the money and you say you are now holding it and are willing to comply with terms, but you make no claim for that sum as liquidated damages, which it was my impression that you had, because I had been reading the briefs instead of the pleadings.

Mr. Mulliner: It is raised in the brief, your Honor. I think Mr. Wilson suggests in the brief that under a [86] California statute down here we can claim it as liquidated damages. We contend that the statute simply says that if it is impracticable to assess the exact damage it is properly set up and paid as liquidated damages, and, on the other hand and further, that the cases hold—and this might

(Testimony of James Carron)

have a bearing upon your Honor's ruling—that if they want to claim otherwise it is necessary for them to plead it.

The Court: I am not familiar with that doctrine.

Mr. Mulliner: The contract recites that it is agreed to as liquidated damages.

The Court: Yes, but they have sued to recover it as money had and received. You are not claiming it as liquidated damages at all. In your answer you say you accepted, you complied, and that there isn't any liquidated damages due at all. By your answer you say you have complied with that contract and you are willing to go through with it.

Mr. Mulliner: I don't so understand our pleading, your Honor. What we claim is that they are not entitled to receive it back.

The Court: Yes.

Mr. Mulliner: They are not entitled to receive it back, and that we are entitled to it either as liquidated damages for their default or as a payment which they made on the property.

The Court: If there is a general denial and you might introduce evidence on liquidated damages, what do you think [87 and 88] of that?

Mr. Wilson: I would like to be heard on that, your Honor.

The Court: I would like to hear from you.

Mr. Wilson: The special defense, as the Court well pointed out, is predicated on the theory that this sum as alleged here is in part payment of the purchase price. It is so alleged in paragraph three. Now, then, if they were to take the other alternative and say it is not a part of the

(Testimony of James Carron)

purchase price but on the contrary it is a penalty or an award or compensation for a loss sustained by reason of a breach, it is necessary that they plead and prove facts necessary to establish their right to this exception to the general principle that liquidated damages cannot be recovered. I would like to read briefly from the—

The Court: I think that I am familiar with that general proposition of law, in the first place, that the law frowns upon liquidated damages, and, in the second place, where any sum is claimed as liquidated damages it must be specially pleaded and especially proven.

Mr. Wilson: From the facts.

The Court: Yes, from the facts. But the point now is this, whether or not in a claim for recovery of money on the common ground such as you have brought here and a general denial of that, whether or not it is permissible for them to show that you are not entitled to the money because they [89] possess it as liquidated damages. Does that case go to that point?

Mr. Wilson: I think it does.

The Court: All right.

Mr. Wilson: This is the Marsh case which I cited in the pre-trial brief and I am reading from page 576. 210 Cal. at page 576:

“In actions such as this the person claiming liquidated damages ‘must show to the court by proper pleadings and competent proof that the contract falls within the law permitting liquidated damages. This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because

(Testimony of James Carron)

from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. The mere stipulations of the contract are insufficient for that purpose.' (McInerney vs. Mack, *supra*, citing a long list of authorities.) This principle has been reannounced in Knight vs. Marks, 183 Cal. 354, and in many more recent decisions of this court and the District Court of Appeal."

My theory of that case is simply this, your Honor, that when the money was delivered to the defendant it held that money as a stakeholder. It was our money and it is still our money unless they have established that at some time or other and by some process or other title has become vested in them. [90] To do that they must establish that they are entitled to it either because it is a part payment of the price as pleaded or that it is a valid provision allowing them to retain it as liquidated damages. In the absence of pleading and proof that the claim is valid as liquidated damages—

The Court: In other words, if they depend upon that as a defense, they must plead that specially rather than a general denial?

Mr. Wilson: Yes. The burden upon them is to show that they have acquired title to our funds.

The Court: I am a little inclined to think that is probably correct, as otherwise, while the matter would be deemed to be denied as far as the plaintiff is concerned, the plaintiff comes into court with no notice, no pleadings whatsoever, that you are expecting to offer evidence as to what your damages were or that they were difficult of proof.

(Testimony of James Carron)

Mr. Mulliner: Yes, but you see, the burden is on them. They are making a general allegation. I wish your Honor would permit Mr. Perelli-Minetti to say a word on that. He has been briefing this question, your Honor.

The Court: All right.

Mr. Perelli-Minetti: I think that counsel's argument, if the Court please, cuts both ways. There was a demand for a bill of particulars here and one was furnished by the plaintiffs, and in their bill of particulars they simply state that there is money due which had previously been paid as a [91] deposit to apply on the purchase price and they ask the return of that money. Now, at this time they apparently feel that this money is returnable at least on one theory that it was liquidated damages. I think under the case which counsel cites, and, by the way, a case in which there were other points involved—

The Court: I don't pursue you in your line of thought there.

Mr. Perelli-Minetti: I didn't understand your Honor.

The Court: You say that upon one theory the plaintiff depends upon recovery on the basis that these are liquidated damages. I thought I understood the plaintiffs' position to be that they claim recovery because the acceptance was not made within the period set forth in the contract. They claim recovery because of failure of—not failure of consideration but because there was no acceptance.

Mr. Perelli-Minetti: I think the brief of the plaintiffs answers that question. At page 2 of the pre-trial brief plaintiffs say, "This stipulation—" I am reading from the first line:

(Testimony of James Carron)

"This stipulation that the deposit shall be retained would be invalid if contained in an agreement."

The word "agreement" is underscored. Then they say: "(CC 1670, 1671). It is not less so because it is embraced in a mere 'offer'."

I don't understand counsel for the plaintiffs to have [92] ever acknowledged that there was an agreement here, and acceptance.

The Court: That is my understanding, too. There was an offer but there was no acceptance. That is your position, isn't it?

Mr. Wilson: Yes, your Honor, with this qualification. I don't want to be bound here by some misunderstanding. I want to point out now that our position is this, that the defendant occupied a dual position. First, it was in the position, the conventional position, of an owner of property receiving an offer to purchase it, and as such, of course, it was a prospective vendor. I say there is no agreement ever effected as far as a change of the properties is concerned because we contend that the vendor never communicated to us an acceptance.

Now, there was a collateral agreement. It was a stakeholder of this fund. It would have been just the same as though the fund had been placed in the hands of some other third person to hold to await the events specified in the offer.

The Court: That does not change the terms.

Mr. Wilson: No, it does not change the terms.

The Court: That does not change the terms or the legal effect of an offer and acceptance of an offer. So,

(Testimony of James Carron)

basically, your right to recover depends on whether or not there is an acceptance. [93]

Mr. Wilson: And a communication of it.

The Court: An acceptance is not an acceptance until it is communicated. You cannot accept something in your sleep.

Mr. Perelli-Minetti: That is right, your Honor. I think, your Honor, that the burden of the plea of liquidated damages is one which does fall upon the party seeking to recover the money. May I suggest to the Court since this matter of liquidated damages has been discussed, that we be permitted to make a motion at this time to amend our answer to specially plead that special defense?

The Court: It is a little late to do that thing now. After the pre-trial conference and the exchange of memoranda you filed one amended answer, and I would seriously doubt that it was a reasonable exercise of discretion to permit you to do that now.

Mr. Perelli-Minetti: If it were a matter, your Honor, which related to some new thought or some new approach which had not been presented, that might be correct, but I think this is in accordance with the briefs and it brings the pleadings in line with them.

Mr. Wilson: Your Honor, may I be heard on that?

The Court: No. I believe perhaps it might be said that the plaintiffs' initial position, or, to borrow from the language of the day, his front line position, is that there never was any acceptance, but that apparently, with caution, he is depending upon the proposition that if the Court cannot [94] agree with him and holds that there

(Testimony of James Carron)

was an acceptance, he then maintains you are not entitled to retain the money as liquidated damages. That is practically it?

Mr. Perelli-Minetti: That is right.

The Court: I don't think, under the pleadings, however, that you would be entitled to put any evidence on without a special defense that it was liquidated damages, and I believe, as you said, that nobody is surprised by your contention that it is liquidated damages.

Mr. Perelli-Minetti: I think that counsel himself just a moment ago said that he anticipated something like this.

Mr. Wilson: If your Honor pleases, I want now to object to any further amendment to the pleadings. The preparation of the trial of the case involved the taking, as you have heard, of the deposition of the plaintiffs by the defendant. There was not then any question raised with respect to the proof of the facts necessary to uphold a covenant for the payment of liquidated damages. We had a pre-trial hearing and nothing was said then that would tend to establish the facts necessary for such a covenant. Then when the amendment was made during the Christmas holidays, the position was taken *than* an affirmative defense was necessary, and that affirmative defense was that the money was received as a part payment of the price. Now, then, to permit them to put in a special second defense and to endeavor to sustain the matter of liquidated damages would mean we would have to go into a matter of [95] proof. We would, of course, like to have pleadings which would set forth the facts upon which we could depend. If we go to the pleadings we would have to go into the matter of evidence and we are

(Testimony of James Carron)

not prepared for that, we don't know what they claim as to the facts.

The Court: I think you are probably right. Objection sustained, and the motion to amend the pleadings is denied.

Mr. Perelli-Minetti: May I have the record show, your Honor, that in making that motion we do not abandon the position that we have taken before and that the burden, where there is not an agreement that it is sought as liquidated damages, is upon the plaintiffs here who have brought us into court under this general pleading that this is their money and they are entitled to the money.

The Court: Well, as you can see, I have wavered back and forth as to the proposition that under the law under a general denial you cannot introduce such evidence, but I am inclined to think that if that is a special defense it should be pleaded as a special defense with facts set out by which the plaintiff may be forewarned and prepared for trial, because they would come to court on the presumption that you were not going to rely on it unless you pleaded it.

Mr. Perelli-Minetti: Your Honor may be right about that—

The Court: Once in a while I am right, but not often.

Mr. Perelli-Minetti: Where we have a contract—I am [96] not too positive about it myself but I am not making any concessions—but where we have a pleading, your Honor, that recites specifically that it was paid in by the contract, reciting the conditions of that, when they come into court they must come in with notice that we might be holding it under the very agreement and the terms of the agreement under which it was deposited.

(Testimony of James Carron)

The Court: That would seem to me, counsel, to argue all the more in favor of a special defense, because in your answer, in your amended answer, you set up the contract, and then you set up as a special defense the proposition that it was a payment on account of the purchase price and you are ready, willing, and able to conclude it, saying nothing about the provision of the contract that it is liquidated damages. The other side is not going to depend upon that provision of the contract because it was not pleaded especially, but you plead the contract. I am sorry I cannot agree with you, but the motion is denied and the objection to the introduction of any evidence on the question of liquidated damages is sustained.

Mr. Perelli-Minetti: I assume that that obviates the necessity of any general offer, your Honor, to show that it would have been impracticable or is now impracticable to prove that—

The Court: That would all go to the same question, but you may make any offer of proof that you desire if you wish to protect your record in regard to the matter.
[97]

Mr. Perelli-Minetti: I don't know that that is necessary, but I will make the offer of proof that this witness that is on the stand now would testify that by reason of the number of people involved in the investigation and preparation of these papers, resolutions, and so forth, including the various officers and directors of the company and the employees of the company, that it would be impracticable for us to attempt to bring them here so as to establish our actual loss or damage.

The Court: The offer of proof is rejected on the basis heretofore given in connection with the motion.

(Testimony of James Carron)

Mr. Mulliner: Counsel suggested something to me this morning that in this court we have to save exceptions.

The Court: Not any more under the rules of Federal Procedure.

Mr. Mulliner: That is what I thought.

The Court: That is the way they are written, but you cannot tell, the Supreme Court might get around to it and say that the rules are unconstitutional and void.

Mr. Mulliner: Then as a precaution I will take an exception to your Honor's ruling.

The Court: I will make this order, that any ruling which I have made during the course of the trial will be deemed excepted to by the other side, the side affected by it, with the same force and effect as if an exception were made.

Q. By Mr. Mulliner: Did you, Mr. Carron, have any [98] conversation with Mr. Estes or Mr. Arthur during the month of April on the subject of the acceptance of this deal? A. Yes, I did.

Q. Give us the date of that.

A. As I recall it, it was April 24th.

Q. Do you have anything in your office records there or correspondence by which you are enabled to fix that date?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained. He has fixed the date.

Q. By Mr. Mulliner: Where were you at that time?

A. I was in my office at 208 West Olympic.

Q. And whom did you call?

A. I called Mr. Arthur in San Bernardino.

(Testimony of James Carron)

The Court: You mean by telephone?

The Witness: Yes, sir.

Q. By Mr. Mulliner: And you say you had known Mr. Arthur for about 10 years? A. That is correct.

Q. Had you talked with him previously?

A. On the 'phone and in person, yes.

Q. Did you recognize his voice on the telephone?

A. Yes, I would say that it was Mr. Arthur.

Q. What did you say to him and what did he say at that time on this subject?

Mr. Wilson: That is objected to as incompetent, [99] irrelevant, and immaterial, hearsay, no foundation laid for it, and not the best evidence, the best evidence being applicable to that part of the question and answer which deals with the corporate act itself.

The Court: Well, as to—I don't know whether it is the best evidence or not because I don't know what he said. This is on the question of acceptance. He might have said, "The company won't accept it" or "I don't think it is a good deal." I don't know what he said. The objection is overruled.

The Witness: What is the question again, please?

(Question read.)

A. When he answered the 'phone I said, "Hello, Art?"

He said, "Yes."

And then I said, "Congratulations."

And he said, "For what?"

And I said, "Because you are the new owner of the Norman Manor and Annex Apartments on E Street."

(Testimony of James Carron)

Then his next remark was, "So they accepted the deal, Herb?"

And I said, "Yes, they have accepted the deal."

Then he said, "What do we do now?"

I said, "Well, the next step is for me to go and take an inventory of the company-owned property."

And he said, "When will you be out?"

I said, "Oh, in the next day or so; perhaps tomorrow." [100] Then I asked him if he would make a reservation for me at the California Hotel, that I would be out the next day, April 25th, and I arranged to meet him, as I recall, at his jewelry store at about noon.

Q. By Mr. Mulliner: All right. Did you meet him?

A. Yes, sir.

Q. And then what did you do?

A. As I recall it, I went on up to the apartment house.

Q. Did you meet anybody else there?

A. Yes, I met Mr. Estes there.

Q. And what did you do there?

A. Then on the 25th we commenced taking the inventory, after discussing the matter with the manager of the apartment house.

Q. And did you proceed to complete the inventory?

A. The following day we completed it.

Q. Who participated in the taking of the inventory?

A. Mr. Estes. Mr. Arthur was there some of the time. The manager, Mrs. Lennon, was there all the time, and myself.

Q. And you worked the 25th, did you? Did you work the evening of the 25th? A. As I recall it, we did.

Q. And finished up when?

A. Oh, about noon of the 26th.

(Testimony of James Carron)

Q. What was the general nature of it? What were you taking an inventory of? [101]

A. Well, we were taking an inventory of every item of furniture in each apartment, each carpet, kitchen utensils, bed linen, and so on.

Q. (Indicating) I don't know whether there is any particular order about that, Mr. Carron. Perhaps you could arrange the sheets for me.

Mr. Mulliner: Will you mark this?

The Clerk: Defendant's C for Identification.

Q. By Mr. Mulliner: I show you what has been marked for identification Exhibit C and ask you to state what it is.

The Court: Have you seen it, counsel?

Mr. Wilson: I have not seen that but I have a photostat of it. That is all right.

The Court: All right.

A. It is what we call a work sheet of an inventory of an apartment house.

Mr. Mulliner: I think I will offer that, Mr. Wilson.

The Court: Is that the one you took?

The Witness: Yes, sir.

The Court: On the date you mentioned?

The Witness: On the 25th and 26th of April, on the two dates.

Mr. Mulliner: I will show that it was signed up at that time, your Honor.

The Court: Do you wish to show it now?

Q. By Mr. Mulliner: Was anything done by way of signing [102] that inventory?

(Testimony of James Carron)

A. Yes. It was signed on this page by Mr. Estes and Mr. Arthur under the heading, "Accepted as correct", and the date of April 26th. This page was signed by Mr. Estes and Mr. Arthur, "Accepted as correct, April 26th."

Q. That is two?

A. This sheet was signed, "Accepted as correct, April 26th," by Mr. Estes and Mr. Arthur.

Q. That is sheet 3?

A. This sheet is signed here also, "Accepted as correct, April 26th," by Mr. Estes and Mr. Arthur.

Q. That is on the back of 3? A. Yes.

Q. The first three sheets that you have recited contain items of inventory on both sides and they are signed on both sides? A. That is correct.

Q. All right, now go to 4.

A. This sheet is signed under the heading, "Accepted as correct, 4/26/44", signed by Mr. Estes and Mr. Arthur. The reverse side is also signed by them, by Mr. Estes and Mr. Arthur.

This sheet with the heading, "Accepted as correct, 4/26/44", is signed by Mr. Estes and Mr. Arthur. This sheet under the heading, "Accepted as correct—"

Q. That is 6 now? You have just finished with 5?
[103]

A. That is right, sheet 6. It is signed under the date of 4/26/44, and it is signed by Mr. Estes and Mr. Arthur.

Mr. Mulliner: We renew the offer, your Honor.

The Court: Admitted.

Mr. Wilson: Pardon me, your Honor. I want to make an objection.

The Court: Pardon me.

(Testimony of James Carron)

Mr. Wilson: I object to it as incompetent, irrelevant, and immaterial, and no foundation laid for it.

The Court: Overruled. Admitted as Defendant's Exhibit C.

Q. By Mr. Mulliner: You have stated it was finished on the 26th? Do you know what day of the week that was, Mr. Carron?

A. If my memory is correct, it was on a Wednesday. I wouldn't be certain without looking at a calendar.

Q. And after it was signed, what did you do with it?

A. I took it back to the Los Angeles office.

Q. And was anything done with it there while you were there?

A. I delivered it to my secretary in the office and gave her instructions to type it and send it to Salt Lake.

Q. Did you type it in the form in which it is set up in Exhibit C? A. No, sir.

Q. What has to be done with it? [104]

A. It has to be totaled or a recap made of it, as we call it. All of the different items have to be counted and then a total of each item has to be set opposite the different items in the inventory.

Q. What was the purpose of taking an inventory at this time?

Mr. Wilson: I object to it as immaterial, and a conclusion of the witness.

The Court: Sustained.

Q. By Mr. Mulliner: Was there any discussion between you and either Mr. Arthur or Mr. Estes as to what would be done with this inventory after it was taken?

A. Yes, there was a discussion.

(Testimony of James Carron)

Q. What was said with relation to that?

A. That it would be totaled and forwarded to Salt Lake City.

Q. Anything further?

A. Yes, the reason for it being forwarded to Salt Lake City was so that the items included in the inventory could be made a part of the bill of sale and also the chattel mortgage.

Q. That is the chattel mortgage that is referred to in Exhibit 1? A. Yes, sir.

Q. When did you deliver that to the sales office here in Los Angeles, if you recall?

A. I am quite sure it was on the next day, April 27th.
[105]

Q. That would be what day of the week?

A. It would be Thursday.

Q. Can you recall whether that assembly, tabulation, and the typing was done in your office while you were there?

A. I am a little doubtful whether it was done while I was there.

Q. And what was the last day that you were with this company?

A. I left the employ of the company on the following Saturday noon, which I believe was the 29th of April.

Q. Where did you go after you left that employment?

A. I went to San Diego.

Q. Have you ever had any communications, telephone conversations, or anything to do with either Mr. Arthur or Mr. Estes concerning this transaction at all since that time? A. No, sir.

(Testimony of James Carron)

Q. Did you have any further communication with them between the 26th, the day you finished the inventory, and the 29th, when you left the employment of the Western Loan & Building Company? A. No, sir.

Mr. Mulliner: I have one more question to ask this witness, Mr. Wilson, but I would like to recall him for it after Mr. Sullivan has testified because its relevancy will not appear at this time.

Mr. Wilson: All right. [106]

Mr. Mulliner: Otherwise you may cross examine.

Mr. Wilson: No questions, if your Honor please.

The Court: All right. Step down.

(Witness excused.)

Mr. Mulliner: Mr. Sullivan, will you take the stand?

F. E. SULLIVAN,

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name?

A. F. E. Sullivan.

The Clerk: Your address?

A. 611 East 20th Street, Oakland.

Direct Examination.

Q. By Mr. Mulliner: Where do you live, Mr. Sullivan? A. In Oakland, California.

Q. And you are employed by Western Loan & Building Company? A. I am.

Q. How long have you been with that company?

A. Since April, 1928.

Q. What position did you hold with the company in 1944? A. I was California Sales Manager.

(Testimony of F. E. Sullivan)

Q. And how long have you held that position?

A. Nearly 10 years.

Q. Does your jurisdiction cover the whole State of California? [107]

A. It does.

Q. Did you have some sales experience before that time?

A. Yes, I did have.

Q. With this company?

A. Yes.

Q. How much before that?

A. Well, for one year, from June 15, 1934, to June 15, 1935, I had charge of operating apartment houses and hotels and also their sale in the Northern District, which includes anything north of the Tehachapi Range.

Q. When did you personally contact either Mr. Estes or Mr. Arthur with relation to this sale that is involved here?

A. My first contact with Mr. Arthur was when I telephoned to him—that is incorrect. I talked to Mr. Arthur and to Mr. Estes, I believe, 90 days before this offer was signed.

Q. With relation to this Manor property?

A. Yes, sir.

The Court: Excuse me, counsel. This is the time we ordinarily take a recess, but I would like to make an inquiry. I have an engagement this afternoon at 4:30 with some lawyers. It is in connection with a mandate by the Circuit Court wherein they do not agree with me, and it is necessary that I keep the appointment today. Would we be able to finish in another hour or shall we go ahead without a recess?

Mr. Mulliner: I don't think we can finish the case in [108] another hour. I can finish in less than that with this direct examination.

(Testimony of F. E. Sullivan)

The Court: I see. Then we will have to go ahead tomorrow with it anyhow.

Mr. Mulliner: Yes, your Honor.

The Court: Very well. We will have the usual recess.

(Short recess.)

The Court: The question was, when?

The Witness: The first time was about 90 days, along about in February.

The Court: That you contacted them?

The Witness: Yes, sir. Mr. Carron was with me at that time.

Q. By Mr. Mulliner: Whom did you contact at that time?

A. I contacted Mr. Estes and then went down to Mr. Arthur's jewelry store and talked to him.

Q. Was that in relation to these Manor properties?

A. Yes, sir.

Q. Did you have any further conversation with either of them in relation to this?

A. Well, at that time Mr. Arthur indicated that he would make an offer to us, which was not satisfactory, and I told him that we could not accept it.

Q. Between that and April 1st did you have any further conversation? A. No, I did not. [109]

Q. Did you have any conversation with either of them during the month of April?

A. During the month of April I didn't talk to or see either of them.

Q. And were you present in San Bernardino on April 1st when this contract, Exhibit 1, was signed up?

A. No.

(Testimony of F. E. Sullivan)

Q. After Mr. Carron had left, did you have anything to do with this inventory or carrying on the deal?

A. On May 3rd, I believe it was, I sent the inventory, the typed inventory, in to the Salt Lake office with a request for the closing papers.

Q. And by closing papers you mean what?

Mr. Wilson: Objected to as immaterial.

The Court: Overruled.

A. The closing papers would be the note or deed of trust, the chattel mortgage, and the bill of sale.

Q. By Mr. Mulliner: Any others?

A. No, that would be all.

Q. Did you mention the deed?

A. Yes, sir, there would have to be a deed.

Q. Any proration papers or insurance papers?

A. The insurance policy, of course, would have to come and the—there would be a letter accompanying those papers from Salt Lake.

Q. And you *receive* those papers from Salt Lake?
[110] A. I did.

Q. When?

A. I think it was about May 8th. If I could see my file there I could tell. (After examining.) Yes, sir, these papers arrived at my office on May 8th—about May 8th.

Q. Does your file indicate when they were sent from Salt Lake?

A. They were sent from Salt Lake on May 5th.

Q. After that did you have any conversation with either Mr. Estes or Mr. Arthur?

A. That morning I tried to call Mr. Estes to arrange to meet him and Mr. Arthur at the Title Company to

(Testimony of F. E. Sullivan)

deposit these papers in escrow, but I could not contact him. So, about 1:30 in the afternoon I had the telephone operator switch the call to Mr. Arthur.

Q. And did you get Mr. Arthur?

A. Yes, I did.

Q. How do you fix that time, Mr. Sullivan?

A. Well, I fix that time because of the fact these papers arrived on that date and because I have a telephone memorandum here furnished by the telephone company that substantiates my opinion that the call was made that date.

Q. Does that indicate a call to San Bernardino on that date?

A. Yes, sir, there was. There were several calls.

Q. And did you make more than one call yourself on this [111] deal?

A. Yes, sir, I did.

Q. And at what time did you get Mr. Arthur?

A. I judge that it was around 1:30 in the afternoon.

Q. What was said in that conversation?

A. That conversation was to arrange to meet with him and Mr. Estes and Mrs. Estes at the Title Company.

Q. What did you say? Just tell us now as nearly as you can what was said by both of you.

A. I said, *Hell*, Mr. Arthur."

And he said, "Yes."

I said, "This is Mr. Sullivan at Western Loan & Building Company."

He said, "Yes."

I said, "I have the papers here and am ready to close the sale."

He then replied, "We are not going through with the sale. Didn't you know?"

(Testimony of F. E. Sullivan)

I told him, no, I didn't know. I was astounded. Then I tried to quiz him to find out the reason that he was not going through with the sale and did not get a satisfactory answer. The only answer he gave me was that he had changed his mind.

Q. Had you at that time, at the time you made that call and had that conversation, received either of the telegrams or letters which appear here as Exhibits 2 and 3?

[112] A. I had not.

Q. Or any other information—

A. None whatever.

Q. —that these people were not going through on the deal, these plaintiffs? A. None whatever.

Q. Were either of these telegrams or either of these letters received by you later? A. Yes, sir.

Q. Just referring to Exhibit 2 there, is that the telegram addressed to 308 West Olympic Boulevard?

The Court: It was stipulated that they were received this morning, both the letters and the telegrams.

Q. By Mr. Mulliner: You heard the stipulation?

A. Yes.

Q. That is correct as to the time they were received?

A. That is correct.

Q. What did you do with reference to those closing papers, Mr. Sullivan?

A. Well, I still had hope that Mr. Arthur and Mr. Estes would change their minds, so I deposited them in escrow at the Security Title Insurance & Guaranty Company in San Bernardino.

Q. Was that all the papers that you have named here?

A. Yes, sir, plus a letter that I wrote to them with instructions as to the manner of closing. [113]

(Testimony of F. E. Sullivan)

Q. That is what you call your escrow instructions?

A. Yes, sir.

The Clerk: Defendant's D for Identification.

Mr. Mulliner: Exhibit D for Identification, your Honor, purports to be a typewritten copy of an inventory of Norman Manor.

Q. By Mr. Mulliner: What is that, Mr. Sullivan?

A. That is the recapitulation of the equipment from the work sheets Mr. Carron furnished, to show the exact number of items of each specific kind that are in the buildings.

Q. Where was that prepared, if you know?

A. That was typed in my office at 308 West Olympic Boulevard.

Q. And that is a copy of what was sent to Salt Lake?

A. Yes, sir.

Q. Do you have a copy of your escrow instructions to the Title Company.

A. Yes, sir, I have them here (producing).

The Clerk: Defendant's E for Identification.

Mr. Mulliner: E for Identification purports to be a letter addressed to the Security Title Insurance & Guaranty Company.

The Court: Has counsel seen a copy?

(The statement was handed to counsel.)

Q. By Mr. Mulliner: I show you what has been marked for identification Defendant's Exhibit E, Mr. Sullivan, and I ask [114] you to state what it is.

A. That is a copy of the letter that I directed to the Title Company on May 9th and on which they acknowledged receipt of these papers by their escrow officer.

(Testimony of F. E. Sullivan)

Q. Did you deliver the papers and take them there personally? A. I did.

Q. On the date that the letter and the receipt bear?

A. That is correct; May 9th.

Mr. Mulliner: I will offer first Exhibit D, if your Honor please.

The Court: The typewritten copy of the inventory?

Mr. Mulliner: Yes.

Mr. Wilson: I have no objection.

The Court: Admitted as Exhibit D.

Mr. Mulliner: I offer now Exhibit E, your Honor. This has just been identified as the escrow instructions.

Mr. Wilson: I object to it as immaterial.

The Court: Overruled.

[DEFENDANT'S EXHIBIT E]

308 West Olympic Blvd., Los Angeles, California

May 9, 1944

Security Insurance & Guarantee Company,

480 Court Street,

San Bernardino, California

Re: 4427-4430 Norman Manor & Norman Manor Annex
Apartments.

Gentlemen:

Please be advised that we have received and accepted an offer for our above numbered properties from Mr. Albert C. Arthur and H. B. & Catherine Estes and wish to deposit the closing documents with you, as agent, to complete the transaction. We enclose the following:

Grant Deed to Albert C. Arthur, an unmarried man, and H. B. Estes and Catherine Estes, husband and wife, as joint tenants.

(Defendant's Exhibit E)

Note for \$65,750.00

Deed of Trust

Chattel Mortgage

Bill of Sale to Albert C. Arthur, an unmarried man, and H. B. Estes and Catherine Estes, husband and wife, as joint tenants.

Title Insurance Policy No. 118045 33/468 Norris issued by the Security Title Insurance and Guarantee Company for \$73,006.33, dated January 21, 1933 (RE 4427).

Title Insurance Policy No. 118044 Norris 33/468 issued by the Security Title Insurance and Guarantee Company for \$21,041.77, dated January 21, 1933 (RE 4430).

United States Fire Insurance Company Policy CL No. 30702 for \$46,000.00 premium \$610.42, expiring April 25, 1947 (RE 4427)

United States Fire Insurance Company Policy CL No. 30703 for \$20,000.00 premium \$189.40, expiring April 25, 1947 (RE 4430)

The purchase price of this property is \$86,750.00, the purchasers have agreed to pay this company \$21,000.00 cash and the balance of the purchase price is represented by the enclosed Deed of Trust.

You are authorized to use the enclosed instruments providing you collect \$21,000.00 cash, less \$4,337.50 that has already been paid to us and providing you will issue a joint protection title insurance policy, showing title perfect in the applicants and the enclosed Deed of Trust the first lien against the property.

The purchasers are to pay interest on the face value of the note from the closing date to the date of the first payment. Please collect this interest in escrow.

(Defendant's Exhibit E)

Rents, taxes and the premium on the enclosed Fire Insurance Policies are to be pro-rated to the closing date. You will kindly collect the unearned premium on the Fire Insurance Policies from the purchasers.

The purchasers have agreed to furnish a War Risk Insurance Company Policy showing loss payable clause to Western Loan and Building Company. This policy is to be in an amount of at least \$65,750.00.

The 1943 taxes, in the amount of \$2398.72 have been paid in full by this company and are to be pro-rated to the closing date. You will kindly collect the portion of these taxes due this company from the purchasers.

As required, the purchasers are to place the down payment into escrow except the \$4337.50 that has already been paid to us as an earnest money deposit and out of the proceeds of the escrow you are authorized to disburse costs for the Title Insurance Policy, Escrow Fee, Federal Revenue Stamps and \$4,000.00 commission due Real Estate Broker, H. B. Estes. This commission due Mr. Estes is only to be paid if the transaction is completed and closed and not otherwise.

A closing date of no later than May 15, 1944 has been agreed upon and as soon as the purchasers deposit the balance of the funds required to complete the transaction in the escrow you are hereby directed to complete the enclosed notices to utility companies and mail them in order that these services may be terminated and closing bills obtained by Western Loan and Building Co.

A rental pro-ration statement will be deposited with you prior to the escrows closing.

(Defendant's Exhibit E)

It is understood and agreed that you accept this letter and all the enclosures with the distinct understanding that if this transaction is not complete and closed by the close of business on May 15, 1944 that this letter and all enclosures will be returned to Western Loan and Building Co. at 308 West Olympic Blvd., Los Angeles, California.

Kindly attach our mortgage clause and endorsements showing the purchasers to be the assured to the attached fire insurance policy.

When the transaction is completed and closed please forward all papers enclosed herein, except the grant deed and bill of sale, properly executed together with your Title Insurance Policy, a statement of the escrow receipts and disbursements in triplicate and your check for the net proceeds of the sale to this company at 308 West Olympic Blvd., Los Angeles, California.


Kindly acknowledge receipt of enclosures on the attached copy of this letter.

Yours very truly,

WESTERN LOAN & BLDG. CO.
F. E. SULLIVAN
California Sales Manager

Important—The undersigned hereby acknowledges receipt of the original of this letter with its enclosures.

Security Title Insurance and Guarantee Company

Please sign here  By J. W. Berry, Escrow Officer
Date May 9, 1944 and return to Western Loan and Building Company, 308 West Olympic Blvd., Los Angeles 15, California.

(Defendant's Exhibit E)

Copy

May 10, 1944

Security Title Insurance & Guarantee Co.

480 Court Street

San Bernardino, California

In Connection Escrow #160572-JWB

RE: 4427-4430

Norman Manor & Norman Manor
Annex Apartments.

Gentlemen:

In connection with our above account and your Escrow, we hand you herewith rent proration statements compiled to and including May 15, 1944, in which you will *not* that \$233.58 is due the purchasers in connection with the Norman Manor Apartments and \$148.83 is due them in connection with the Norman Manor Annex Apartments. The aggregate rent proration due the purchasers is \$381.91, which you are authorized to pay to them upon completion of sale from proceeds in Escrow.

The Western Loan and Building Company has collected advance cleaning charges from tenants as itemized in the rent pro-ration statements. You are also authorized to pay this sum aggregating \$60.00 to the purchasers from proceeds in the Escrow upon completion of the sale.

Rent accounts due from a number of the tenants are to be paid between the date the attached statements were compiled and the scheduled closing date of May 15th, and these tenants therefore owe rent as shown in the statements by their respective circled accounts. To simplify the pro-ration, the Western Loan and Building Company has taken credit for these rents due from the Norman

(Defendant's Exhibit E)

Manor Apartment tenants, in the amount of \$78.57 and from the Norman Manor Annex Apartment tenants in the amount of \$16.00, or an aggregate amount of \$94.57. If the purchasers object to this company taking credit for this sum, you are hereby authorized to add \$94.57 to the rent proration due the purchasers and deduct this sum from the net proceeds of the Escrow, after the sale has closed.

You are authorized to close this sale prior to May 15, 1944 if requested to do so by the purchasers, and you will deduct the sum of \$47.41 for each day prior to May 15, 1944, from the amount of the rent-pro-ration due the purchasers.

Yours very truly,

WESTERN LOAN & BLDG. CO.
BY F. E. SULLIVAN

FES:sbs

* * * * *

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Defts. Exhibit E. Date Jan. 10, 1945. No. E in Evidence. Clerk. U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

The Court: (Indicating) Were those attached to the letter?

Q. By Mr. Mulliner: Will you answer that?

A. They were attached to the letter.

The Court: Are those the originals?

(Testimony of F. E. Sullivan)

The Witness: Those are the originals.

The Court: That were delivered to the Title Company? [115]

The Witness: Delivered to the Title Company.

The Court: And that consists of the documents you have heretofore mentioned?

The Witness: Yes.

The Court: Let us attach them to Exhibit E. They were delivered with the letter?

The Witness: Yes.

Mr. Wilson: May I look at them?

Mr. Mulliner: Yes (handing). I may ask the witness to go through them again and see if they are all there.

Q. By Mr. Mulliner: Calling your attention again to Exhibit E, Mr. Sullivan, to which you just referred, and to the documents which are now attached to it, will you just go through and state what those documents are?

A. The first document is a grant deed to Albert C. Arthur, an unmarried man, and H. D. Estes and Kathleen Estes, husband and wife, as joint tenants.

Q. Is that deed executed by the proper officers of Western Loan & Building Company? A. It is.

Q. What is the next document?

A. The next document is a bill of sale.

The Court: Who are those officers?

The Witness: The vice president signing this deed is C. J. Sumner, and R. B. Ritchie, secretary of the company, also signed. [116]

The Court: Are you an officer?

The Witness: No, sir.

(Testimony of F. E. Sullivan)

The Court: Were you during that period or at any time?

The Witness: No, sir.

The Court: Go ahead. Excuse my interruption.

A. (Continuing) And there is this bill of sale to the equipment that is described in that inventory, which is also executed by C. J. Sumner, vice president, and R. B. Ritchie, secretary. And there is a deed of trust prepared for Albert C. Arthur, an unmarried man, H. V. Estes and Kathleen Estes, husband and wife as joint tenants, which was furnished the escrow for their convenience on our forms, and a trust deed note for the balance due of \$65,750. They are all dated May 5, 1944. There is the chattel mortgage for the same equipment as itemized in the inventory that is prepared for the signatures of Albert C. Arthur and H. V. Estes and Kathleen Estes. This rent proration statement here was not deposited with these papers but was deposited the next day.

Q. By Mr. Mulliner: What is that?

A. That is a rent proration statement compiled to May 15th to prorate rents so as to give the purchasers any advance rents we might have collected from the tenants.

Q. And is that contained in your escrow instructions to the company?

A. It is in the supplementary instructions that I filed with them on May 10th. [117]

The Court: It will all be part of Exhibit E and admitted. Do you want to record an objection?

Mr. Wilson: Do I understand that the two rental statements were later delivered to the company?

(Testimony of F. E. Sullivan)

Mr. Mulliner: Yes, he said this last document, the prorate of rents on the apartments, was delivered the next day. We might take out the supplemental instruction sheet, and his Honor has—

The Court: That can all be attached to Exhibit E and admitted.

Q. By Mr. Mulliner: Did you deliver this proration statement and the supplement yourself personally to the Title Company? A. I did.

Q. And that, you said, was on the 10th?

A. Yes, sir.

Mr. Mulliner: Now, Mr. Wilson, can we stipulate that the plaintiffs were advised that these instruments were there in escrow and that they declined to execute them or proceed further with them?

Mr. Wilson: We will stipulate we were so advised on May 10th.

Mr. Mulliner: Well, the date is May 10th—

The Court: But you were advised they were in escrow on May 10th?

Mr. Wilson: Yes. [118]

The Court: He asked more in the stipulation.

Mr. Mulliner: They did not proceed with it, they declined to go forward?

Mr. Wilson: That is right. We will so stipulate. They received notice that the documents referred to, or at least the documents in a general way, were with the Title Company on May 10th.

(Testimony of F. E. Sullivan)

The Court: When did you get them back from the Title Company?

The Witness: I asked them in a letter I sent them on the 17th and their transmittal letter is dated May 22nd.

Q. By Mr. Mulliner: Was that after the Title Company had advised you that the parties had refused to come in to the escrow? A. Yes, sir.

Q. I show you now what has been marked as Exhibit F, Mr. Sullivan, and ask you to state briefly what that is.

The Court: Has counsel seen it?

The Witness: This is a statement from the Southern California Telephone Company for telephone bills incurred for the period April 12th to May 8th, and there is one there on May 9th, a separate statement.

Q. By Mr. Mulliner: It covers the period including April 25th and May 8th, does it? A. Yes, it does.

Q. Is that the original bill as received in your office [119] from the Telephone Company, and the original toll bills as delivered to your office from the company?

A. Yes, sir.

Q. Covering those dates? A. Yes, sir.

Mr. Mulliner: We offer this exhibit, your Honor, and particularly the entries as to toll charges thereon for April 24th and May 8th.

The Court: Admitted as Exhibit F.

[DEFENDANT'S EXHIBIT F.]

TO SOUTHERN CALIFORNIA TELEPHONE
COMPANY, Dr.

740 South Olive Street, Los Angeles 55

[Crest]

(See Reverse of Stub for Addresses of Other Telephone
Business Offices)

If this bill is not paid within fifteen days from date of
presentation, service may be discontinued, in which event
restoration will not be made until this bill has been paid.

May 11, 1944

Approved for payment—Sundry Rental—Advances or
general expense Adm Exp Acct. No. 5 Phone Number
Western Loan & Building Co., 1005 S. Hill D. F.

7383

PR

9-3

Exchange service charges for one
month preceding date of this
bill 15 (incl. U. S. tax of

5.34✓

40.94

35.60 + 15% tax ~~5.34~~)

~~40.94~~

Message unit charges to date of

this bill (total message units used

1.147) (incl. U. S. tax of 40.15 + 6.02)

46.17✓

Toll, telegram, and messenger charges

(statement enclosed)

26.81✓

Other charges or credits (explanation en-
closed)

1.50✓

45191

Directory advertising charges for one month

beginning with date of this bill.....

(Defendant's Exhibit F)

Balance from previous bill (Please deduct
from total any amount of this balance paid
before receiving this bill)

Total ~~115.42~~ ✓
115.42

[Stamped]: May 19, 1944.

Rule and Regulation Regarding Disputed Bills

In case of a dispute between the subscriber and the Company as to the correct amount of a bill rendered by the Company for service furnished to the subscriber, which cannot be adjusted with mutual satisfaction, the subscriber may deposit with the Railroad Commission of the State of California at its office in the State Building, Los Angeles, the amount claimed by the Company to be due. Deposit checks, money orders, etc., must be made payable to the "Railroad Commission, State of California." Upon receipt of said deposit, the Commission will investigate the complaint and communicate its findings to the parties.

Failure on the part of the subscriber to make such deposit with the Railroad Commission within fifteen days after notice by the Company that such deposit must be made or service may be discontinued, shall warrant the Company in discontinuing the service without further notice.

Notice

Bills are not paid until the money is received at one of our established collection offices, and the customer must assume responsibility for any delays in our receipt of money or for our failure to receive money, turned over to other agencies for payment to us.

(Defendant's Exhibit F)

Toll Service and Telegrams

Place Called*

For Abbreviations, See Reverse

Pro 7383

		Amount	*Tax
May	FWD		
9	2144 SBO—RE	45	
	43057 SLK—RE	2	50
	Credit Plan Calls		
Apr	4UD 633		
8	BH to Oak	1	10

Total of Above Service Charges 21 45✓

Total U.S. Federal Tax 5 36✓

Total Carried to Bill 26 81✓

*U. S. Tax Schedule

15%—Telephone messages under 25c

25%—Telephone messages, 25c and over

25%—Telegraph messages domestic

10%—Telegraph messages international

*Explanation of Code following

“Place Called”

A—This Company Telegram

B—Other Company Telegram, Cable
or Radio Message

C—Collect Message

Toll Service and Telegrams

Place Called*

For Abbreviations, See Reverse

(Defendant's Exhibit F)

Pro 7383

		Amount	*Tax
Apr			
12	Lamon SBO✓	55	
13	53172 SBO✓	45	
	53172SB O✓	45	
22	43057 SLK✓	2 85	
24	Lannon SBO✓	55	
	Arthur SBO RE	55	
26	Hernan 6LTN✓	50	
27	CLX T LA✓	2 20	
	LA to CLX✓	2 40	
29	2486 RIV✓	40	

May

1	275 ORG✓	35	
2	“ ✓	80	
6	Jansen Elc RE	1 85	
8	Carron SD—RE	1 10	
	5831 SBO—RE	45	
	Arhturs SBO—RE	1 10	
	Estes SBO—RE	85	

Total of Above Service Charges

Total U. S. Federal Tax

Total Carried to Bill

✓

*U. S. Tax Schedule

15%—Telephone messages under 25c

25%—Telephone messages, 25c and over

(Defendant's Exhibit F)

25%—Telegraph messages domestic

10%—Telegraph messages international

*Explanation of Code following

"Place Called"

A—This Company Telegram

B—Other Company Telegram, Cable
or Radio Message

C—Collect Message

Southern California Telephone Company

Explanation of "Other Charges and Credits"

Appearing on the Enclosed Bill

Pr 7383

Item	Monthly Rate	Period (See Note)		Charge or Credit
		From	To	
Charge for Moving				
Extension Telephone				
May 4				1 50

Mr. Thornburg's phone.

Total Carried to Bill 1 50

Note: The period shown is from date of connection, dis-
connection or change to the date of the enclosed bill
unless otherwise explained in the associated item.

Case No. 3815-PH. Arthur, et al. vs. West. Loan.
Defts. Exhibit F. Date Jan. 10, 1945. No. F in Evi-
dence. Clerk, U. S. District Court, Sou. Dist. of Calif.
J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien.
Clerk.

(Testimony of F. E. Sullivan)

Q. By Mr. Mulliner: Now, Mr. Sullivan, reference was made this morning to a Sherwood sale at Riverside in which Mr. Estes said he acted as agent, and the Mission Riverside transaction at Santa Barbara, in which he stated he acted as one—was at least involved as one of the purchasers. Are you familiar with those transactions? A. I am.

Q. These documents that you have identified here—state whether or not those same documents, I mean as to form, were used in those transactions, those two previous transactions?

Mr. Wilson: Objected to as immaterial.

The Court: Sustained. I cannot see the materiality of it. No objection has been made to any form.

Mr. Mulliner: If I may say so after your Honor's ruling—

The Court: Yes.

Mr. Mulliner: —the theory of it is that these [120] transactions at least established knowledge on the part of one of the plaintiffs here as to these documents.

The Court: You mean as to their form and contents?

Mr. Mulliner: Yes.

The Court: There has never been any question raised at all that I have heard of in the case about the form or contents of the documents or any objection to them or anything else. I cannot see the materiality. It does not fit into either your defense, your special defense, or the plaintiffs' theory of the case.

Q. By Mr. Mulliner: I will ask you this, Mr. Sullivan, and don't answer until counsel has had a chance to object: I will ask you, if you know of your own knowledge, to state whether or not in those transactions there were payments put up as earnest money, as in the

(Testimony of F. E. Sullivan)

case that we have here, in both of the previous transactions?

Mr. Wilson: I object to it as incompetent, irrelevant, and immaterial, and a conclusion of the witness.

The Court: Sustained.

Mr. Mulliner: In that connection, your Honor, I merely offer to show that the money in each of those other instances was applied upon the purchase price when the deal went through.

The Court: You are willing to do that here, aren't you? That is what your answer says.

Mr. Mulliner: Yes, we are willing to do that here, but I make that offer to prove this was just preliminary to that [121] offer. I assume counsel will object.

The Court: Objection sustained and the offer of proof denied.

Q. By Mr. Mulliner: Mr. Sullivan, I will ask you if at or near the time of your telephone call to Mr. Arthur, at the time you have fixed on May 8th, you made any other call reporting your conversation with Mr. Arthur?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: This is for the purpose of fixing the time, your Honor.

The Court: Overruled. Admitted for that limited purpose.

A. I believe I made three calls that day that I succeeded—I attempted to make several calls but could not, of course, get Mr. Estes, as I have already explained.

Q. By Mr. Mulliner: Let us just confine it. Did you call Mr. Carron?

A. Yes, I called Mr. Carron at San Diego.

(Testimony of F. E. Sullivan)

Q. When was that with relation to the time you talked to Mr. Arthur?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: This is for the purpose, as I stated, your Honor, of fixing the time.

The Court: Overruled and admitted for that limited [122] purpose.

A. It was about 2 o'clock in the afternoon.

Q. By Mr. Mulliner: Did you succeed in getting him? A. Yes, I did.

Q. And where was he at that time?

A. At his office in San Diego.

Q. And at that time did you say anything as to whether or not you had had a conversation with Mr. Arthur? A. I did.

Mr. Wilson: Wait just a minute. That is objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: I think I am not entitled to get the contents other than to identify it and identify the subject of it.

The Court: Objection sustained.

Q. By Mr. Mulliner: What was the subject of that conversation?

Mr. Wilson: The same objection.

The Court: Sustained.

Mr. Mulliner: You may cross examine.

The Court: Gentlemen, I see it is 4 o'clock. I dislike to recess this early, but in view of the fact that, while you are all from out of town, you have to be here tomorrow anyhow, it would be a matter of great convenience to me if I could recess now unless you have some

(Testimony of F. E. Sullivan)

witnesses you want to excuse and finish with them tonight. [123]

Mr. Mulliner: We have none.

The Court: Very well.

Mr. Mulliner: I made the same reservation with respect to Mr. Carron.

The Court: Very well. We will recess until 10 o'clock in the morning.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., Thursday, January 11, 1945.) [124]

Los Angeles, California, Thursday, January 11, 1945.
10 a. m.

The Court: All right, proceed. You had finished with Mr. Sullivan?

Mr. Mulliner: There are a few matters I overlooked, your Honor.

F. E. SULLIVAN,
recalled.

Direct Examination
continued.

Mr. Mulliner: Mr. Wilson, I will ask you if you have the original of a telegram received by the defendants from the Salt Lake office in answer to the telegram introduced yesterday and made a part of Exhibit 2, I believe.

(The document was produced by Mr. Wilson.)

The Clerk: Defendant's G for identification.

Mr. Mulliner: Can we stipulate that G is the wire that I just referred to?

Mr. Wilson: Yes, subject to my objection to its introduction if you want to offer it.

(Testimony of F. E. Sullivan)

Mr. Mulliner: I am offering it. I was just getting the stipulation that it was the answer to the telegram of the plaintiffs.

Mr. Wilson: Yes.

Mr. Mulliner: I offer it, if your Honor please.

Mr. Wilson: I object to it as incompetent, irrelevant, and immaterial, hearsay, and no foundation laid for it.

Mr. Mulliner: It is a part of the same transaction. It [125] is just simply an answer to their telegram introduced yesterday.

The Court: Objection overruled. Admitted in evidence as Defendant's Exhibit G.

[DEFENDANT'S EXHIBIT G.]

WESTERN
UNION

A. N. Williams
President

Class of Service

Symbols

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

DL=Day Letter
NL=Night Letter
I.C=Deferred Cable
NLT=Cable Night Letter
Ship Radiogram

(02).

1944 May 9 PM 1 40

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time at point of destination

(Defendant's Exhibit G)

PZS67. WUKH298 ((FIVE) 42=SALT LAKE CITY
UTAH 9 152P

ALBERT C ARTHUR AND H B ESTES=
(SAN BERNARDINO CALIF)=

ANSWER YOUR WIRE YOUR OFFER TO PUR-
CHASE WAS ACCEPTED AND YOU WERE SO
NOTIFIED PRIOR TO MAY FIRST. UNDER
TERMS OF SAID OFFER CANNOT SEE WHY
YOU ARE ENTITLED TO EFUND OF DEPOSIT.
PLEASE ADVISE WHY YOU THINK YOU ARE
SO ENTITLED=

WESTERN LOAN AND BUILDING COMPANY.

[Stamped on face]: [Not legible]

The Company Will Appreciate Suggestions From Its
Patrons Concerning Its Service

Case No. 3815-PH Arthur, et al vs. West. Loan.
Defts. Exhibit G. Date Jan. 11, 1945. No. G in Evi-
dence. Clerk, U. S. District Court, Sou. Dist. of Calif.
J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,
Clerk.

Mr. Mulliner: Do you have the original of the letter
of Mr. Sullivan's written on the 9th to the defendants on
the same matter?

(The document was produced by Mr. Wilson.)

The Court. It may be marked H. I suppose you offer
that, and the same objection?

[DEFENDANT'S EXHIBIT H.]

Established 1892

[Crest]

WESTERN LOAN AND BUILDING COMPANY

45 East 1st South Street . . . Salt Lake City 12, Utah

May 9, 1944

A. A. Smith

President

R. D. Tobin

Vice President

C. J. Sumner

Vice President and

General Manager

R. B. Ritchie

Secretary & Treasurer

F. E. Sullivan

California Sales Manager

308 West Olympic Blvd.

Los Angeles 15, California

Mr. Albert C. Arthur

Fourth and E Streets

San Bernardino, California

Re: Norman Manor and
Norman Manor An-
nex Apartments

Mr. H. B. Estes

Mrs. Catherine Estes

439-24th Street

San Bernardino, California

Madam and Gentlemen:

This will confirm the telephone conversation between J. A. Carron and Albert C. Arthur on April 24, 1944, in which Mr. Carron informed Mr. Arthur of the approval by the Western Loan and Building Company Home Office of the sale of the Norman Manor and Norman Manor

(Defendant's Exhibit H)

Annex Apartments under the terms of your Offer to Purchase.

We have deposited with the Security Title Insurance and Guarantee Co., #480 Court Street, San Bernardino, California, the papers and documents necessary to complete the transfer.

You are respectfully reminded that according to the terms of your Offer to Purchase the closing date is May 15, 1944.

Very truly yours,

WESTERN LOAN and BUILDING CO.

By F. E. SULLIVAN

F. E. SULLIVAN

Calif. Sales Manager

Registered Mail

Return Receipt Requested

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Defts. Exhibit H. Date Jan. 11, 1945. No. H in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Mr. Wilson: Yes, the same objection.

The Court: The same ruling.

Mr. Mulliner: Can we stipulate in this connection—you have given me one original—that each of the plaintiffs received a copy of this letter on the 10th day of May, 1944, which is Exhibit H?

Mr. Wilson: So stipulated, subject to the objection stated, your Honor.

(Testimony of F. E. Sullivan)

The Court: All right.

Q. By Mr. Mulliner: Mr. Sullivan, yesterday I neglected to ask you with reference to May 8th—you stated that you attempted to get Mr. Estes and that you did get Mr. Arthur on the telephone on that date. Do you recall?

A. Yes, sir.

Q. I will ask you if later you got Mr. Estes on the telephone? [126]

A. Yes, I did.

Q. And what day was that?

A. That was the same day, May 8th.

Q. And can you tell us the time of day, about the time of day, when you were able to reach him?

A. It was after the close of business; I think about 5:30.

Q. And did you have a conversation with him with relation to this matter?

A. Yes, I did.

Q. State what that was.

Mr. Wilson: I object to it as incompetent, irrelevant, immaterial, and hearsay.

The Court: What is the purpose of this?

Mr. Mulliner: Well, it is on the same day, your Honor.

The Court: Does it show an admission against interest?

Mr. Mulliner: I will show the notification that we were ready to proceed and I will show that this was—

The Court: Overruled. You may answer.

A. Well, I advised Mr. Estes that I had talked to Mr. Arthur and explained to him that we had the papers there to close the sale and that Mr. Arthur had advised me that he was not going to complete it, he was not going through with it. I then asked Mr. Estes if he could give me a reason, as Mr. Arthur had not given me a satis-

(Testimony of F. E. Sullivan)

factory reason. Mr. Estes then remarked that Mr. Arthur had cooled off on the deal [127] because we had taken so much time. I think he used the words "monkeyed around."

Q. By Mr. Mulliner: State whether that conversation was before or after the receipt by you of the telegram Exhibit 2 or the letter or letters Exhibit 3.

A. That is the letters and telegrams advising that they were not going through with the deal?

Q. That is right.

A. That conversation took place before I had received them.

Q. Now, calling your attention to April, while Mr. Carron was there, I will ask you if you were present in the office here in Los Angeles, your office, when Mr. Carron placed a call to either of the plaintiffs.

A. I was.

Q. And have you any way of fixing that date definitely? A. I have.

Q. What is that?

A. I received a letter from my general manager accepting the offer that day.

Q. Let me hand you your file. See if you can find that letter for us.

A. (Producing) That is the letter there, written on April 22nd.

The Clerk: Defendant's 1 for identification.

Q. By Mr. Mulliner: You have handed me now a letter [128] marked 1 for identification. Is this the letter that you just referred to? A. Yes, it is.

The Court: Just a moment.

(The document was handed to Mr. Wilson.)

(Testimony of F. E. Sullivan)

Q. By Mr. Mulliner: That letter purports to be dated, Mr. Sullivan, April 22, 1944? A. Yes.

Q. And when was it received in your office?

A. It was received in our office Monday morning, April 24th.

Mr. Mulliner: We offer Exhibit I, your Honor.

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial, and hearsay and—

Mr. Mulliner: Before I press the offer—

Mr. Wilson: And that no foundation has been laid for it.

Mr. Mulliner: —let me lay a little further foundation.

Q. By Mr. Mulliner: Who was that letter signed by? Do you know the signature?

A. C. J. Sumner, who was general manager of the company. He is also executive vice president and my final executive authority on all sales.

Q. Is that a part of your records and files in your office?

A. That is a part of my record and my file. [129]

Q. And you are producing it from your file?

A. That is correct.

Mr. Mulliner: I now press the offer, your Honor, in view of the fact that the plaintiffs have testified here that they were told that the authority would come and would have to come from Salt Lake, and I think perhaps it comes under public records statute with relation to the hearsay rule in this state also.

The Court: What public records statute?

Mr. Mulliner: The business records statute.

The Court: You mean the presumption that the ordinary course of business has been followed?

Mr. Mulliner: Yes.

(Testimony of F. E. Sullivan)

Mr. Wilson: I make the same objection, your Honor.

The Court: I don't think it does. The objection is sustained. No foundation laid; hearsay. You may leave it there with the clerk, marked for identification.

Mr. Mulliner: Yes. I was wondering about your Honor's ruling as to the foundation. That does not go to the sufficiency of the identification or the signature?

The Court: Oh, no. It is lacking in foundation because there is no connection between it and the plaintiffs.

Mr. Mulliner: You see, I presented it, your Honor, because they had stated that authority had to come from Salt Lake.

The Court: I understand. [130]

Mr. Mulliner: I am presenting this as the authority coming from Salt Lake.

The Court: Very well.

Q. By Mr. Mulliner: At that time what was done by Mr. Carron, if anything— A. Well, I—

Mr. Wilson: Wait—

Q. By Mr. Mulliner: —with relation to the plaintiffs here?

Mr. Wilson: Wait just a minute. That is objected to on the ground it is incompetent, irrelevant, immaterial, and hearsay, and not the best evidence, and, furthermore, that no foundation has been laid for it. These objections, your Honor, were previously made to the same subject matter which was covered by Mr. Carron's testimony, if I remember correctly, with respect to this same related oral notification.

Mr. Mulliner: If that is the basis, we submit it, your Honor.

The Court: What was that?

(Testimony of F. E. Sullivan)

Mr. Mulliner: I say, if that is—counsel says it goes simply to the oral notice rather than a written notice. I say, if that is it, we will submit the objection without any argument.

The Court: Well, the question is, what was done by Mr. Carron?

Mr. Mulliner: In this witness' presence. [131]

The Court: Oh. Overruled.

A. Mr. Carron placed a call for Mr. Arthur in San Bernardino.

Q. By Mr. Mulliner: Now, did you listen to the conversation at that time, Mr. Sullivan, or any part of it?

A. I heard him congratulate Mr. Arthur.

Mr. Wilson: I move to strike the answer, your Honor, on the grounds it is not responsive.

The Court: State your objection as the basis of a motion to strike.

Mr. Wilson: Your Honor, I move to strike out the answer on the ground it is not responsive to the question and that it was given before an opportunity was afforded to object thereto.

The Court: What is your objection to the question?

Mr. Wilson: The objection is that—

The Court: Hearsay?

Mr. Wilson: It is incompetent, irrelevant, immaterial, hearsay, and no foundation has been laid for it.

Mr. Mulliner: What I am attempting to show, your Honor, is that he listened to a part of the conversation that Mr. Carron has already testified to.

The Court: Objection sustained. The answer is stricken.

(Testimony of F. E. Sullivan)

Q. By Mr. Mulliner: Where were you, Mr. Sullivan, when this call was placed?

A. I was in the office. [132]

Q. Well, in what office? A. Mr. Carron's office.

Q. Was he present there? A. Yes.

Q. At the telephone? A. Yes.

Q. And did you remain there during the whole conversation?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Mr. Mulliner: I just want to make my record.

The Court: Very well. Go right ahead.

Mr. Mulliner: I think the *witness' might* possibly be interpreted as a conclusion, so I will ask him again:

Q. By Mr. Mulliner: Did you hear a part of the conversation or purported conversation? A. Yes.

Mr. Wilson: The same objection.

Q. By Mr. Mulliner: At that time? A. Yes.

Mr. Wilson: Pardon me, your Honor. I want to make the same objection but I have not had an opportunity to make it.

The Court: The answer may be stricken for the purpose of making the objection.

Mr. Wilson: Objected to as incompetent, irrelevant, [133] immaterial, hearsay, and no foundation laid for it.

The Court: The objection is overruled. The question is, Did you hear a part of the conversation?

A. Yes.

Q. By Mr. Mulliner: And that part, I assume, was what Mr. Carron said or something that he said?

A. Yes.

(Testimony of F. E. Sullivan)

Q. Will you state what you heard him say in that conversation?

Mr. Wilson: The same objection.

The Court: Sustained.

Q. By Mr. Mulliner: I call your attention now, Mr. Sullivan, to a provision in this contract, Exhibit 1:

"* * * that the Owner will at once commence investigation hereon and cause appraisals to be made and an examination by its Executive Committee to be had, that some time and a substantial expense will be required, and that the exact loss and expense to Owner cannot be determined. To cover such, a deposit as stated below is agreed upon and settled—" I thought there was stated something in here about the loss of sales, sales that may be lost.

"The undersigned Offerer understands and agrees that upon receipt of this offer and pending approval and closing that other sales may be lost to the Owner."

You are familiar, of course, with that provision?

A. Yes. [134]

Q. Now, when this offer was received, and pending the closing, did you continue or discontinue any efforts to sell this property?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Q. By Mr. Mulliner: Or did you discontinue showing the property?

Mr. Wilson: The same objection.

The Court: The same ruling.

Mr. Mulliner: Your Honor, I am just—

The Court: Laying your foundation and making your record. Go right ahead and make it.

(Testimony of F. E. Sullivan)

Mr. Mulliner: That is all I am doing, as your Honor recognizes.

The Court: That is all right. I practiced law a long time.

Mr. Mulliner: It perhaps comes within your Honor's ruling, but I want to show by this witness that in this area where there are war activities the elements that enter into the demand and the market are the war conditions, that with the war going on this class of property is completely filled so far as occupancy is concerned and there is no competitive building of other apartment houses, so that there are demands that come in and go out, and in that connection that we cease all efforts to sell the property to anybody else and simply [135] tie it up, and that we made no effort to sell it during this interval and for some time after May 10th, and that we have been unable since to sell it or procure a similar offer because of market conditions. I offer that proof.

Mr. Wilson: To which we object on the ground it is incompetent, irrelevant, and immaterial.

The Court: The objection is sustained.

Mr. Mulliner: We save an exception.

Q. By Mr. Mulliner: Mr. Sullivan, did you have any commission coming out of this transaction in any way?

Mr. Wilson: The same objection.

Mr. Mulliner: The question of commission was discussed yesterday, commissions to Mr. Estes.

The Court: What difference does it make if Mr. Sullivan has a commission?

Mr. Mulliner: I am just asking—

Q. By Mr. Mulliner: Were you on a salary or on a commission basis? A. A straight salary.

(Testimony of F. E. Sullivan)

Q. You had no interest so far as any commission is concerned whether this property was sold?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: I think perhaps his other answer covers it.

The Court: I think it does. The objection is sustained. [136]

Q. By Mr. Mulliner: I will ask you, as sales manager of this company, to state whether or not you and the company are ready, willing, and able to go through with this deal and have you always been so ready and willing.

Mr. Wilson: Wait just a minute, Mr. Sullivan. Are you finished, Mr. Mulliner?

Mr. Mulliner: Yes.

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial, and upon the ground it is not the best evidence, that there is no foundation laid for it, that it is hearsay and the conclusion of the witness.

The Court: I think he can answer if he knows.

A. I am sure that the company would—

The Court: The objection is overruled. Do you know whether or not—

The Witness: I know that they would complete the sale if they would comply with their part.

Q. By Mr. Mulliner: And you know that they always have been willing to do that?

Mr. Wilson: The same objection, your Honor.

The Court: The same ruling. Overruled.

A. That is right, they have always been ready to complete the sale.

The Clerk: J for identification.

[DEFENDANT'S EXHIBIT J

FOR IDENTIFICATION]

Earl Warren

Governor

Sacramento Office

Business and Professions Building

[Crest]

STATE OF CALIFORNIA
DIVISION OF REAL ESTATE

Hubert B. Scudder, Commissioner

April 21, 1944

Mr. C. J. Sumner
Vice Pres. and Gen. Mgr.
Western Loan and Building Co.
45 East 1st South St.
Salt Lake City, Utah

Dear friend Chris:

In Re: Norman Manor and Norman Manor Annex.

I have your advices to the effect that you have an offer of \$86,750 for the above apartment house in San Bernardino, with \$21,000 down payment and the balance in terms.

I believe this to be an advantageous offer and herewith advise you of my approval of this sale.

Sincerely yours

H. B. Scudder

HUBERT B. SCUDDER

HBS:MP

[Written in ink]: C. J. Sumner.

[Stamped]: Rec'd. 12:45 Apr 24 1944 Western Loan
& Bldg. Co.

(Defendant's Exhibits J)

Case No. 3815-PH. Arthur, et al. vs. West Loan. Defts. Exhibit J. Date Jan. 11, 1945. No. J Identification. Clerk U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

The Court: What is that?

Mr. Mulliner: It is a letter signed by H. B. Scudder, [137] your Honor.

Q. By Mr. Mulliner: Who is H. B. Scudder?

A. H. B. Scudder is a director in the company and he is also California Real Estate Commissioner.

Q. So far as this company is concerned?

A. He is a director, a California director.

Q. This letter is from the records and files of the company, is it not?

A. That was sent directly to Salt Lake by Mr. Scudder.

Q. It comes out of the records—

Mr. Wilson: Pardon me, your Honor. I have a little difficulty hearing Mr. Sullivan. Will you speak a little louder?

The Witness: Yes, I will. This is a letter that was sent by Mr. Scudder to the general manager, Mr. C. J. Sumner, Salt Lake City, Utah.

Q. By Mr. Mulliner: Is the signature at the bottom Mr. Sumner's signature?

A. That is Mr. Sumner's signature.

Q. Are you familiar with the signature of H. B. Scudder? A. I am.

(Testimony of F. E. Sullivan)

Q. Have you seen him sign it on other occasions?

A. On several occasions.

Q. State whether or not that is his signature on Exhibit J. [138]

A. That is Mr. Scudder's signature.

Mr Mulliner: This is a further offer, I may say to your Honor, in connection with this recital in the contract as to what we would do and be required to do—

The Court: On liquidated damages?

Mr. Mulliner: By getting an official approval, and so forth, and I make a further offer of this letter at this time in that connection.

Mr. Wilson: I object to it.

Mr. Mulliner: I offered yesterday the information as to the appraisers.

Mr. Wilson: Objected to on the grounds it is incompetent, irrelevant, immaterial, hearsay, and no foundation laid for it.

The Court: Sustained. It may be marked for identification.

Mr. Mulliner: I think you may cross examine.

Cross-Examination

Q. By Mr. Wilson: During the month of April, 1944—

The Court: Mr. Wilson, we can all hear you better if you use that lectern.

Mr. Wilson: Your Honor, this wind over here carries the voice of the witness away from us.

(Testimony of F. E. Sullivan)

The Court: For that reason, if you stand there the witness will talk loud enough for you to hear him.

Mr. Wilson: If he will. [139]

Q. By Mr. Wilson: During the month of April, 1944, who comprised the Executive Committee of the defendant company, Mr. Sullivan?

A. One member is the general manager of the company, C. J. Sumner. I don't know who the other two members are at the present time.

The Court: Well, at the present time? Did you know in April, 1944?

The Witness: No, I did not.

Mr. Mulliner: I did not get an objection in there, your Honor, but this is apparently cross examination on excluded matters and I therefore ask that it be stricken as incompetent, irrelevant, and immaterial, and not proper cross examination.

The Court: Let me see Exhibit 1. (After examining) Overruled.

Q. By Mr. Wilson: Do you know who comprised the members of that committee during the month of May, 1944?

Mr. Mulliner: Now, I will make the objection, your Honor, that it is incompetent, irrelevant, and immaterial, and no proper cross examination, because all of our offers with relation to that provision of the contract were excluded.

The Court: You offered them in relation to liquidated damages and I sustained the objections for the reasons

(Testimony of F. E. Sullivan)

which I attempted to indicate yesterday with relation to that. You have examined this witness concerning Exhibit 1, however. Now, [140] it says that it will cause an examination by its Executive Committee to be had. In reading the contract it would be the logical conclusion that before an offer would be accepted an examination by the Executive Committee would have to be had. For that reason I am permitting this cross examination as being cross examination on the subject of whether or not there was an acceptance, not upon the subject of whether there was or was not liquidated damages.

Mr. Mulliner: I see that, your Honor, but I don't want to limit my offer to the question of liquidated damages. I didn't so limit it in making it. I offered it in connection with, as I said, the provisions of the contract.

The Court: Well, I think perhaps, then, in that event that I was in error in excluding your Exhibit 1 which was the—was Mr. Scudder a member of the Executive Committee?

The Witness: Not to my knowledge.

Mr. Mulliner: You mean by that you don't know?

The Witness: I don't know.

The Court: Then I was in error in excluding Exhibit 1 and I will reverse myself on that and admit Exhibit 1 in evidence, not to the question of liquidated damages, but limited solely to the question of acceptance.

[DEFENDANT'S EXHIBIT I]

WESTERN LOAN AND BUILDING COMPANY

Inter-Office Stationery

Home Office

To Mr. F. E. Sullivan, California Sales Manager
Los Angeles

From Mr. C. J. Sumner, General Manager

Date April 22, 1944

Subject RE 4427-4430

Norman Manor & Annex

Dear Mr. Sullivan:

Sale of the above properties as outlined in your letter of April 5th is approved.

Enclosed is analysis of operations.

Closing papers will be prepared as soon as you forward the necessary papers to prepare them.

Your very truly,

C. J. Sumner
General Manager

CJS:ek

Enc

(Defendant's Exhibit I)

WESTERN LOAN AND BUILDING COMPANY
Inter-Office Stationery
Oakland Real Estate Sales

To Mr. C. J. Sumner, General Manager

From Mr. F. E. Sullivan, California Sales Manager

Date April 5, 1944

Subject

R.E. 4427 Norman Manor Apts.

R.E. 4430 Norman Manor Annex

San Bernardino, California

Dear Mr. Sumner:

This will advise you that we hold an offer to purchase the above properties, adjoining buildings, on the following terms:

Sale price: \$86,750.00

Cash: 21,000.00

Balance of 65,750.00 to be paid at rate of \$591.75 per month including 6% interest. Purchasers to have the privilege of paying additional principal payments of \$4,931.25 in any one calendar year and the entire balance due at the end of 120 months.

We hold a 5% deposit in the amount of \$4,337.50.

The purchasers are Mr. Albert C. Arthur and H. B. and Catherine Estes.

Mr. H. B. Estes is also the broker in the transaction and will receive \$4,000.00 commission from the closing escrow.

The offer was increased over an original offer of \$85,000.00 to allow for the additional commission and

(Defendant's Exhibit I)

to permit Mr. Estes to participate as buyer. Mr. Arthur, a San Bernardino jeweler, is undoubtedly supplying most of the cash payment, but he and Mr. Estes are associated as owners of other properties, Mr. Estes attending to their operation.

We have contacted these people many times and as the offer represents all the property is worth on the present market we are ordering the independent appraisals by Messrs. Saint and Schmutz. If Mr. Schmutz is not available we will submit the offer with only one appraisal.

We will keep you advised.

Very truly yours,

F. E. Sullivan

California Sales Manager

FES:JW

[Stamped]: Received 8:30 Apr 8 1944 Western Loan & Bldg. Co.

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Defts. Exhibit I. Date Jan. 11, 1945. No. I in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Mr. Mulliner: Does that ruling also go to the Scudder letter, your Honor?

The Court: No.

Mr. Wilson: May we have the last question read?

[141] (Question read.) A. No.

(Testimony of F. E. Sullivan)

Q. By Mr. Wilson: You stated yesterday, I believe, that at some time on May 8th or May 9th, 1944, you got hold of Mr. Arthur on the telephone?

A. That is correct, May 8th.

Q. May 8th? And at that time Mr. Arthur said to you, didn't you know that he was not going through with the deal? A. Yes, he did.

Q. Didn't he tell you that a telegram had been sent to you so informing you? A. Yes.

Q. Had the telegram been received by you or had you been aware of its contents when you telephoned Mr. Arthur? A. No, sir.

Q. The next day you say you brought some papers down to the Security Title Company?

A. That is correct.

Q. You did it personally? A. Personally.

Q. Did you go over on the—did you go about a block away, to Mr. Arthur's store, to see if he was there?

A. No.

Q. Did you get in touch with him at all?

A. No.

Q. Nor Mr. Estes? [142]

A. I contacted Mr. Estes on the 10th.

Q. I am speaking now of the 9th.

A. I did not contact either of them on the 9th.

Q. When was it that you arrived in San Bernardino with the papers and delivered them to the Title Company, Mr. Sullivan?

A. Approximately 4 o'clock in the afternoon.

Q. When was it you wrote the letter which we have here as Exhibit H?

A. That was written in the morning.

(Testimony of F. E. Sullivan)

Q. Written before you came to San Bernardino?

A. Yes.

Q. When you wrote that letter had you received information respecting the contents of the telegram of May 8th?

A. It was read to me by an operator or someone at the Western Union over the telephone.

Q. Then you did know?

A. I did on the 9th, yes, but not on the 8th.

Q. I mean, you did know before you wrote the letter that the telegram had been received revoking the offer?

A. Yes.

Mr. Wilson: No other questions, your Honor.

The Court: Step down.

Mr. Mulliner: Just a minute, Mr. Sullivan.

Redirect Examination

Q. By Mr. Mulliner: On this question of approvals in [143] Salt Lake by the Executive Committee or other persons there, was that handled by you?

A. No, sir.

Q. What was your authority or information with relation to that?

A. My authority and instructions and information were to submit these offers to the general manager, Mr. C. J. Sumner.

Q. And where did you receive your authority from to proceed with the closing of the sale?

A. From Mr. C. J. Sumner.

Q. How long had that procedure been going on?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

(Testimony of F. E. Sullivan)

Mr. Mulliner: I can show authority, your Honor, by a course of procedure and dealings, and so could these people if any question came up on this man's authority to put these papers in escrow.

Mr. Wilson: If your Honor please, may I be heard?

The Court: I think that is aside from the other question of the Executive Committee. Of course, this agreement is not signed by the Western Building & Loan. They could not compel them to get an appraisal by the Executive Committee, but that is the representation that is made in their printed form which they furnished.

What is the question again, Mr. Reporter? Will you [144] read it? (Question read.)

The Court: Overruled.

A. For 10 years, to my knowledge.

Q. By Mr. Mulliner: And approximately how many sales had that procedure gone on in connection with?

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial.

The Court: You mean, how many sales in California?

Mr. Mulliner: Yes.

The Court: Overruled. I doubt its materiality but I will let it in.

A. I would say at least 500.

Q. The final authority for the escrow papers came from Mr. Sumner?

Mr. Wilson: Wait just a minute, please. That is objected to on the ground it is incompetent, irrelevant, immaterial, and no foundation has been laid for it.

The Court: That is according to your previous testimony?

The Witness: Yes.

(Testimony of F. E. Sullivan)

The Court: And the authority to you, that is what you acted on?

The Witness: Yes, sir.

The Court: The objection is overruled.

Q. By Mr. Mulliner: And communicated substantially as in Exhibit I? [145]

Mr. Wilson: The same objection.

Q. By Mr. Mulliner: Was that according to your custom and practice over these years?

The Court: Overruled.

A. Yes.

Q. By Mr. Mulliner: Did that cover sales also in San Bernardino? A. Yes.

Q. And also sales in which Mr. Estes was agent or purchaser?

Mr. Wilson: The same objection.

The Court: The same ruling.

A. Yes.

Q. By Mr. Mulliner: These that have been referred to? A. Yes.

The Court: Did you ever show Exhibit I to Mr. Estes or Mr. Arthur?

The Witness: I did not. Pardon me. That is I? No, sir.

The Court: Were you ever present when it was exhibited to them by anybody?

The Witness: No, sir.

The Court: Did you ever read it to them?

The Witness: No, sir. When I received this letter I turned it over to Mr. Carron, who had been handling the deal, and told him to communicate the information to them. [146]

(Testimony of F. E. Sullivan)

The Court: All right.

Q. By Mr. Mulliner: You said you turned the letter over to Mr. Carron. When was that?

A. That was on April 24th.

Q. Was that at the time you said he placed the call?

A. Yes.

Mr. Mulliner: I believe that is all with this witness.

Mr. Wilson: No further questions.

The Court: Step down.

(Witness excused.)

Mr. Mulliner: Mr. Carron, will you take the stand?

JAMES CARRON,

recalled as a witness in behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Further Direct Examination

Q. By Mr. Mulliner: Mr. Carron, I neglected to ask you when you were on the stand the other day—you testified to the taking of this inventory, you recall, at San Bernardino? A. Yes, sir.

Q. And you testified to the signing of the inventory by Mr. Estes and Mr. Arthur? A. Yes.

Q. Where was that signed?

A. Mr. Estes signed it at the building, in the lobby of the apartment house. Mr. Arthur signed it at his jewelry store. [147]

Q. Now, with relation to the signing of Exhibit 1, where did you say Exhibit 1 was signed? Exhibit 1 is the offer to purchase, Exhibits 1 and 6, they are different copies of the same instrument.

(Testimony of James Carron)

A. The offer to purchase, Exhibit 1, was signed in the lobby of the California Hotel.

Q. On what date?

The Court: You have covered that before. It has been asked and answered.

A. On April 1st.

Mr. Mulliner: It was just preliminary, your Honor.

Q. By Mr. Mulliner: Now I will ask you if Mr. Sullivan was there at that time.

A. Mr. Sullivan was not there.

Q. Either at the signing or any of the discussions on that day with relation to the transaction?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: It was asked and answered before. You asked him that when you had him on the witness stand before and he said he was there alone.

Mr. Mulliner: I believe not as to whether Mr. Sullivan was there. I overlooked that. I asked Mr. Sullivan if he was there.

The Court: Objection overruled.

A. Mr. Sullivan was not there. [148]

Q. By Mr. Mulliner: So far as you know, was Mr. Sullivan present at any discussion with either of these fellows at any time during the month of April?

A. Not to my knowledge.

Q. I will ask you now—I believe you stated that after you left the employ of this company you went to—

A. San Diego.

Q. —San Diego?

A. Yes, sir.

Q. I will ask you if in May and after you went to San Diego you received a telephone call—whether or not you received a telephone call from Mr. Sullivan with relation to a telephone discussion that he had had with Mr. Arthur.

(Testimony of James Carron)

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Mr. Mulliner: This, your Honor, is the same one. I am fixing the time on the 8th, the time with relation to our tender of these documents.

The Court: It is merely cumulative to show the date of the 8th.

Mr. Mulliner: It will also show the hour of the day.

The Court: That is the only purpose for which it is offered?

Mr. Mulliner: That is the only purpose and it may be limited to that. [149]

The Court: Overruled. You may answer.

The Witness: What was the question?

(Question read.)

A. I did.

Q. By Mr. Mulliner: Now, can you tell us the day?

A. I can give you the date. It was May 8th.

Q. And can you tell us the time of the day?

A. Approximately 2 o'clock in the afternoon.

Q. Showing you now Exhibit I, I will ask you if you have ever seen that before?

A. (After examining) Yes, I have.

Q. When did you first see it?

A. On the morning of April 24th.

Q. And was that before or after you placed the call to Mr. Arthur that you have testified about here?

A. It would have to be before because—

Mr. Wilson: Just a minute.

(Testimony of James Carron)

The Court: That may be stricken.

Q. By Mr. Mulliner: I just asked you—

The Court: Do you remember?

Q. By Mr. Mulliner: —if it was before or after.

A. It was before.

Q. State whether or not Mr. Sullivan was there at that time? A. Mr. Sullivan was there.

Q. In the office here in Los Angeles? [150]

A. Mr. Sullivan was there.

Q. I will ask you, Mr. Carron, whether there had been any written correspondence passed between the company or the company office here, the defendants, and these plaintiffs or either of them with relation to this transaction up until the time you left?

A. Nothing in writing that I know of.

Q. Were you receiving any commission on this deal if it had been completed or were you on a salary basis?

Mr. Wilson: Objected to.

The Court: It is immaterial. You don't have to disprove any bias or interest or prejudice. The witness is presumed to speak the truth.

Mr. Mulliner: I think that is all with this witness, Mr. Wilson, but before I sit down—well, I will let you cross examine.

Mr. Wilson: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Mulliner: This is a matter, your Honor, that I am simply making a record on.

The Court: All right.

Mr. Mulliner: Your Honor has ruled on it, but I offer to prove by Mr. Sullivan, who is here and has been sworn, that on both the Sherwood Melvin deal, handled by Mr. Estes, and the Mission Riverside deal, also handled by him, and in which [151] he was a purchaser, that the deposit, the earnest money deposit such as we have involved in this action, was applied upon the purchase price of those properties. I offer that as bearing upon a practical interpretation of this offer to purchase by at least one of the parties plaintiff here.

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial, and no foundation laid for it.

The Court: Sustained.

Mr. Mulliner: I offer in that connection also to prove that the inventory in each of those instances was taken as it was taken here, as we contend, after notification of the acceptance from Salt Lake.

Mr. Wilson: The same objection.

The Court: Sustained.

Mr. Mulliner: We rest, your Honor.

Mr. Wilson: Do we have a morning recess?

The Court: I don't care. Do you want one?

Mr. Wilson: About five minutes.

The Court: All right. The court will be in recess.

(Short recess.)

Mr. Wilson: Mr. Estes,

H. B. ESTES,

called as a witness for the plaintiffs in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

[152]

Q. By Mr. Wilson: Mr. Estes, during the time the negotiations or conversations which preceded the signing of this offer on April 1, 1944, at the California Hotel, was there any discussion about an inventory?

Mr. Mulliner: Was that at the time of the signing?

Mr. Wilson: Yes.

A. Previous to it, you said?

Q. By Mr. Wilson: Yes; not previous in the sense of the previous day, but previous to the signing on the same day. A. On the occasion of the signing?

Q. That is right.

A. You mean at the meeting at the California Hotel?

Q. At the California Hotel April 1st.

The Witness: May I hear the question again?

(The question was read as follows:

"Q. Mr. Estes, during the time the negotiations or conversations which preceded the signing of this offer on April 1, 1944, at the California Hotel, was there any discussion about an inventory?")

A. Yes.

Q. By Mr. Wilson: What was said at that time and by whom relative to the subject of an inventory?

A. The representative, I don't remember which one, or both, stated that an inventory and an appraisal of the apartment house would have to be taken and that they would let us know when it would be convenient to take that inventory and [153] have the property appraised.

(Testimony of H. B. Estes)

Q. I can't hear you.

A. They said they would let us know when it would be convenient to take an inventory and to have the property appraised.

Q. Is that all that was said about the inventory on that occasion?

A. They said an inventory would have to be taken before it could be approved at Salt Lake.

Q. Anything further?

Mr. Mulliner: May I have that answer read?

Answer read.)

Q. By Mr. Wilson: Anything further?

A. They also stated that the property would have to be appraised.

Q. I am referring now particularly to the subject of the inventory. What was said at the time and place that I have resigned relative to the subject of the inventory? We don't want to go over the other matters that were discussed. So far as the conversation had to do with the subject of the inventory, just relate what was said and by whom, if anything further was said.

A. They said they would let us know when it would be convenient to take an inventory.

Q. Have you stated the full conversation so far as it had a bearing on that subject? [154]

A. Yes, I think so.

Q. By "they" referred to in these answers of yours, to whom do you refer?

A. Well, either Mr. Carron or Mr. Sullivan or both of them. I don't know who was there. I don't remember which representative was there or if they were both there.

(Testimony of H. B. Estes)

Q. Well, it was one or the other or both?

A. That is right.

Q. Of these two men you have named?

A. Yes, sir.

Q. Subsequent to April 1, 1944, was this subject, speaking now of the subject of taking the inventory, discussed by you with either or both of these gentlemen whom you have named?

Mr. Mulliner: You mean prior to April 1st?

Mr. Wilson: No, subsequent.

A. I can't—I have this deal confused with other deals and I don't remember that point.

Q. By Mr. Wilson: Well, there was an inventory taken, it appears, sometime about the 25th of April?

A. Oh, yes, sir.

Q. And you had a part in that? A. Yes, sir.

Q. Now, before the actual taking of the inventory, between April 1st and April 25th did you have a discussion with either Mr. Carron or Mr. Sullivan about the taking of [155] this inventory of this property?

A. The day that we took the inventory we had a discussion before the inventory was taken.

Q. I said, between the two dates, April 1st and April 25th, was there any discussion?

A. I don't remember.

Q. You don't recall? A. No.

Q. During the taking of the inventory—strike that, please.

Do you remember the days upon which the inventory was taken?

A. I don't remember the exact dates, no, sir.

The Court: Well, it was taken April 25th, according to the testimony and according to the signature there.

(Testimony of H. B. Estes)

Now, he wants to know if there was any discussion during that time.

The Witness: We discussed the inventory the day the inventory was taken.

Q. By Mr. Wilson: With whom?

A. With the representative.

Q. Who was he?

A. I think it was either Mr. Carron or Mr. Sullivan.

Q. Who helped you take the inventory?

A. Either the—I think it was Mr. Carron.

Q. What was said, if anything, during the taking of the inventory, during the days of April 25th and 26th, by Mr. [156] Carron relative to the subject of the inventory?

A. Well, the morning that we took the inventory we had some soft drinks over at the Carnation.

Q. Let us get down to the inventory.

The Court: He wants to know what was said. Did you say anything at all or did you just go around silently?

The Witness: Well, we just checked all the articles in the apartment house.

Q. By Mr. Wilson: Was anything said about the inventory other than that?

A. Just in a general way.

The Court: Did anybody say anything about having to get the inventory approved by Salt Lake? That is apparently what counsel is driving at.

The Witness: Yes, sir.

Mr. Mulliner: I think that is leading.

The Court: Yes, it is leading, but in the interest of saving time I will exercise my discretion and permit my own leading questions.

(Testimony of H. B. Estes)

Q. By Mr. Wilson: May I have the answer, please?

A. Yes, sir.

Mr. Wilson: You may cross examine.

The Court: What was said?

The Witness: They said that Salt Lake would have to approve the inventory before they could approve the deal, I mean, the inventory would have to be approved before they [157] could approve the deal.

The Court: All right. Cross examine.

Cross-Examination

Q. By Mr. Mulliner: Mr. Estes, you said that whoever was there purporting to represent the company said on April 1st that the inventory would have to be approved at Salt Lake? A. Yes, sir.

Q. You are not sure who said that?

A. No, sir, because I am not sure whether Mr. Carron or Mr. Sullivan was representing the company.

Q. There wasn't any mention in the agreement that you signed at that time of taking an inventory, was there?

A. Will you repeat the question, please?

Q. In this agreement that you signed up, **this offer** to purchase, there wasn't anything said about taking the inventory, was there? A. Not in the escrow.

Q. You don't mean escrow? You mean offer to purchase? A. That is right, the **offer to purchase**.

Q. After it was signed up, I believe you called up Mr. Carron a time or two, didn't you, to ask him if the deal had been closed or—pardon me. Strike that last part.—to ask him if acceptance had been received from Salt Lake? A. Yes, sir.

Q. Or something to that effect? A. Yes, sir.
[158]

(Testimony of H. B. Estes)

Q. When did you call him after April 1st?

A. Oh, it might have been a week or maybe 10 days.

Q. And what did you say to him?

A. I asked him if he had heard from Salt Lake and if the deal had been approved.

Q. When did you call him again?

A. Well, a short time after that.

Q. A week or such a matter?

A. It could have been.

Q. What did you say to him then?

A. I asked him the same thing, if the deal had been approved by Salt Lake.

Q. Did you call him again before the 25th?

A. I don't know.

Q. But at least those two times?

A. I think so. I think it was twice.

Q. Now, you didn't say to him at that time, "Let's get busy and take the inventory," did you, "so that Salt Lake will approve this"? A. No, sir.

Q. When you called him up and asked him if Salt Lake had approved it, you thought it might have been approved by Salt Lake, is that correct?

A. Well, I don't know if those telephone calls were before or after we had taken the inventory.

Q. I am just talking about the two calls that you said. [159] one about a week after April 1st and one about a week after that.

A. I think those calls were all made after the inventory was taken.

Q. Well, you want to change your previous testimony?

A. Yes, sir, I think so. Yes, sir.

(Testimony of H. B. Estes)

Q. You did not call him up at any time between April 1st and April 25th to ask him whether the deal has been closed or whether Salt Lake had approved the deal?

A. No, sir, I don't think so.

Q. You think you were wrong about that?

A. Yes.

Q. Now, you have already testified that you had two other deals here? A. Yes, sir.

Q. Don't you know, as a matter of fact, that the inventory was taken in both of those apartment house deals after the acceptance by Salt Lake?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: I think it is proper cross examination, your Honor, under the procedure.

The Court: Overruled. You may answer the question.

A. I don't remember how those were handled because they were about a year apart, a year before this deal.

Q. By Mr. Mulliner: You wouldn't say that the inventory [160] was not taken after the acceptance, would you?

A. The way I remember it, we took the inventory and then the escrow papers were brought up from Los Angeles.

Q. Yes. Now, the inventory is incorporated in the chattel mortgage and that is a part of the escrow, isn't it? A. Yes, sir.

Q. And that was true of all your transactions with this company? A. Yes, sir.

Q. And you have to have an inventory for that purpose? A. Yes, sir.

(Testimony of H. B. Estes)

Q. In order to list the properties in the chattel mortgage which is given back as partial security for the payment of the note? A. Yes, sir.

Q. And that is the purpose in taking it, isn't it?

Mr. Wilson: That is objected to as immaterial and a conclusion of the witness.

The Court: Sustained.

Mr. Mulliner: I didn't hear you, your Honor.

The Court: Sustained. The objection is sustained. The purpose of taking it calls for a conclusion of the witness.

Mr. Mulliner: I thought I could ask that on cross examination, your Honor.

The Court: Well, if you press the point you can insist on an answer, but what difference does it make? Everybody [161] knows that is the purpose in taking an inventory. You have got to have an inventory to have a chattel mortgage.

Q. By Mr. Mulliner: What he really told you, Mr. Estes, was that these papers that went into the escrow were made up in Salt Lake, didn't he, and that they would come from Salt Lake?

A. He told me that the approval would have to come from Salt Lake. I don't know where the papers were made up.

Q. He told you that the escrow papers had to come from Salt Lake, didn't he?

A. No, sir, I don't think he did.

Q. This deposition that we have referred to that you gave in this matter in September, 1944, do you recall that at that time you testified that—

The Court: Show it to him first, counsel.

(Testimony of H. B. Estes)

Q. By Mr. Mulliner: Look at page 6, if you will, Mr. Estes, of that.

Mr. Wilson: What line?

Q. By Mr. Mulliner: Look at line 17. Now, did you testify at that time with relation to these calls to the office of the defendant after this document was signed on April 1st, beginning at line 17:

"Q. And if you made two calls, perhaps another 10 days would intervene?

"A. Yes, maybe a week or something like that."

That is your answer, "Yes, maybe a week or something [162] like that." That purports to be your answer? A. Yes, sir.

Q. (Reading):

"Q. And on the first of those calls, if there were more than one, what answer did you get from Carron or Sullivan?

"A. That they were still waiting for an answer from Salt Lake."

A. Yes, sir.

Q. You did so testify, did you not?

A. Yes, sir.

Q. Now, was that a fact? A. Yes, sir.

Q. That you did make those calls in that interval?

A. Yes, sir.

Q. Between April 1st and April 25th? Look up at line 4 there where your attention is called to the date.

A. Yes, sir.

Q. Is your testimony as I read it to you correct, that you made those calls after April 1st and before the inventory was taken?

A. It is not clear to me now when I did make the calls. I know I made two calls and maybe more but I

(Testimony of H. B. Estes)

don't remember what dates. I have had so many calls to them that it is rather confusing to place them with any certain dates.

Q. I call your attention on page 5 to line 21:

"Q. In other words, any of the details or arrangements [163] which affected the sale such as the escrow, the inventory and things of that nature, you have related them all?

"A. Well, he said after the inventory would be taken then Salt Lake would have to send their escrow instructions from Salt Lake to the Title Company."

Did you so testify? A. Yes, sir.

Q. And is your testimony there correct?

A. Yes, sir.

Q. Then you did understand that the details of the escrow instructions would come from Salt Lake, didn't you? A. Yes, sir.

Q. After the inventory went in? A. Yes, sir.

Q. I call your attention to page 16, Mr. Estes, and line 23:

"Q. When you signed the inventory were there any conversations about the sale that are different from those you have just related?

"A. The only thing that was said at that time that I remember was that we wanted to rush it through as fast as possible.

"Q. What did he say to that?

"A. He said it had to take so long and certain things had to be done and when those things were done the papers would be back." [164]

Did you so testify? A. Yes, sir.

Q. And was your testimony correct?

A. Yes, sir.

(Testimony of H. B. Estes)

Q. Didn't you understand that these papers that were to come back were to come back from Salt Lake?

A. No, sir. I didn't know whether they had to come from Salt Lake or the Los Angeles office.

Q. Well, they wouldn't have to come back to Carron if they were in the Los Angeles office, would they?

A. Carron would always bring those papers up there with him.

Mr. Mulliner: I think that is all, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Wilson: Mr. Arthur.

ALBERT C. ARTHUR,

called as a witness in behalf of the plaintiffs in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. By Mr. Wilson: Mr. Arthur, on April 1, 1944, at the California Hotel in San Bernardino, at the time and place when this offer, Exhibit 1, was signed by you and Mr. Estes, [165] was there any discussion relative to the taking of an inventory? You can answer that yes or no.

A. Yes.

Q. And who were present on that occasion?

A. Mr. Carron and Mr. Sullivan.

Q. Anybody else? A. Mr. Estes.

Q. Anybody else?

A. No. There were a lot of people in the lobby.

(Testimony of Albert C. Arthur)

Q. No, I mean who were members of the group involved in this transaction, do you understand?

A. That is right.

Q. What was said at that time and by whom upon this subject, speaking of the taking of an inventory?

A. Well, preceding the signing of this offer to purchase, that was the first time I had seen them and I asked Mr. Carron the exact meaning of this offer and the part that it was in the whole deal. He said that they had no power to sell us any property and that a customer or client, whatever they call them, could only fill out one of these offers to purchase and that then had to go to Salt Lake, and Salt Lake would have to get an appraisal on the property and an inventory of the furnishings and then decide whether our offer would be accepted or rejected. If our offer was accepted it then was ready for escrow for a deal. If it was rejected we then had permission to change our price and make a new offer [166] to purchase and start over again.

Q. Is that the substance of the conversation at that time and place upon this subject?

A. We talked for about a half hour on generalities.

Q. No, I am talking about this subject, that is, the subject of inventory.

A. The inventory and the appraisal of the property would have to be taken care of before we could even get an answer on this offer to purchase.

Q. Have you detailed all the conversation on that subject that you recall? A. That about answers it.

Q. Very well. Was the same subject later discussed by you or in your presence?

A. You mean at a later date?

Q. Yes.

(Testimony of Albert C. Arthur)

The Court: Well, fix the dates.

Q. By Mr. Wilson: Was it discussed on April 25, 1944?

The Court: On the occasion of the inventory, do you mean?

Q. By Mr. Wilson: At the time you assembled and took the inventory?

A. The conversation took—

Q. Just answer yes or no. A. No.

Q. Did you discuss this matter of the taking of the [167] inventory and its purpose at that time on April 25, 1944? A. No.

Q. Was anything said on that day or any day before or after April 25th relative to the taking of an inventory?

A. Yes, on the next day when they came down with the inventory figures and asked me to sign them, I asked them what happened from here on and when we would know when the deal would be completed. He said all we could do would be to send the inventory to Salt Lake and we would have to wait for information from them. I asked him how soon would he be able to let me know. He said I probably would not hear from him at all, that he was leaving the company, and that I would receive the information whether Salt Lake approved the inventory and the appraisal from Mr. Sullivan.

Q. Who is "he"? A. He is Mr. Carron.

Q. Very well. Anything further said on this occasion that you have just referred to?

A. That is all.

Mr. Wilson: Cross examine—pardon me just a minute—yes, you may cross examine.

(Testimony of Albert C. Arthur)

Cross-Examination

Q. By Mr. Mulliner: When Carron told you on the 26th that he was leaving and you would not hear from him but you would hear from Mr. Sullivan, what did Sullivan say?

A. On that day? Sullivan was not there. [168]

Q. Sullivan was not there? A. No.

Q. That is the day the inventory was—

A. That is the day the inventory was completed.

Q. You are sure now that Sullivan was not there at that time? A. That is right.

Q. And on April 1st, what you are saying is that Mr. Sullivan or Mr. Carron said to you that the inventory would have to be taken and sent to Salt Lake before there would be any acceptance or approval received from Salt Lake? Is that what you say?

A. The inventory and the appraisal of the property would have to be sent to Salt Lake before this offer to purchase—

Q. Let us just talk about the inventory. Do you say now that they told you that this inventory would have to go to Salt Lake, be taken to Salt Lake, before there would be any approval or acceptance of this deal by the Salt Lake office? A. Yes, sir.

Q. That is what they told you? A. Yes, sir.

The Court: How many rooms in the apartment house? How many apartments?

The Witness: I don't know.

The Court: Does anybody know? [169]

Mr. Sullivan: 42 apartments.

The Court: It was furnished?

The Witness: Yes.

(Testimony of Albert C. Arthur)

Mr. Sullivan: Yes.

Q. By Mr. Mulliner: So you did not expect that there would be any approval or acceptance from Salt Lake until this inventory had been taken and sent in, did you?

A. That is right.

Q. What was your answer?

A. That is right. Yes, sir.

Q. But you did call up the office of the Western Loan here and ask them if the deal had been accepted in Salt Lake, didn't you?

A. I did not.

Q. Did you ever ask either Mr. Carron or Mr. Sullivan between April 1st and April 25th whether or not the deal had been accepted or approved?

A. We had conversations of another deal at which conversations it would come up as to whether anything had been heard from Salt Lake.

Q. By the other deal do you mean the De Anza deal?

A. Yes.

Q. Wasn't that before this?

A. It was all during the same time.

Q. You went down to the De Anza some time before this deal and looked at the property down there? [170]

A. I don't recall the dates.

Q. You gave your deposition previously and it was taken down by Mr. Lynde, court reporter at San Bernardino, did you not?

A. Yes, sir.

Q. (Handing) I call your attention to page 11, line 25—perhaps I better go up a little—to line 21:

“Q. Would you see both of them or just one of them?”

“A. Generally one at a time. Generally Carron.

“Q. You generally saw Mr. Carron about once a week following April 1st?

“A. That is right.”

(Testimony of Albert C. Arthur)

Is that your testimony?

A. Pardon me. You are reading where, please?
You are on page 11?

The Court: What line?

Mr. Mulliner: I started at 21.

Q. By Mr. Mulliner: You are talking there about two of them, do you get that place? You have the place there? When you say both of them there, who are you referring to?

A. Mr. Carron and Mr. Sullivan.

Q. Did you testify as I just read from your deposition there? A. Yes, sir.

Q. Going on:

“Q. And these meetings took place in your store?
[171]

“A. That is right.

“Q. That is in San Bernardino?

“A. That is right.

“Q. And taking the first of these meetings, what conversation did you have with Mr. Carron about the property?

“A. I would ask him when we would know about the deal and he would just keep on ‘stalling’ me and telling me we had to wait for Salt Lake.

“Q. What do you mean by ‘stalling’?

“A. As far as the answer to—in other words, an approval from Salt Lake.

“Q. He simply stated to you you had to wait for Salt Lake’s answer?

“A. Yes, sir; there was nothing he could do. In other words, our deposit was made subject to Salt Lake.”

Did you so testify? A. Yes, sir.

(Testimony of Albert C. Arthur)

Q. And was that testimony true?

A. Yes, sir.

Q. Going on:

"Q. And that was substantially the whole conversation?"

"A. That is right.

"Q. And then the next time you met Mr. Carron the same thing happened?"

"A. The same thing over again.

"Q. And the next time and the next time? [172]"

"A. There has been no change."

Did you so testify? A. Yes, sir.

Q. Then you go from there, you will notice on 13, and testify about the call in April with relation to taking the inventory, down near the bottom on page 13. Do you notice that? A. Yes.

Q. Did you answer it? A. Yes, sir.

Q. From the examination that you have just made, without reading it all, you went into the question of the call in April about taking the inventory?

A. Yes, sir.

Q. You did receive a call from Mr. Carron with relation to that, did you not? A. Yes, sir.

Q. And you met Mr. Carron when he went out to take the inventory, did you not? A. Yes, sir.

Q. And at that time you thought the deal had perhaps been accepted, I mean before you took the inventory?

A. No, sir.

Q. You did not think so?

A. I asked Mr. Carron if it had been accepted and he told me it was not accepted. [173]

(Testimony of Albert C. Arthur)

Q. You thought it might have been, didn't you?

A. No, sir.

Q. Didn't you? Why did you ask him if it had been if you thought it could not be?

The Court: That is argumentative, counsel.

Mr. Mulliner: That is true, your Honor, but it is cross examination.

The Court: I know, but on my own motion I will sustain the objection to that question.

Q. By Mr. Mulliner: I call your attention to page 5 of your deposition—I will withdraw that question.

Starting on line 21 on page 14:

“Q. Did you have any conversation at that time with Mr. Carron concerning an acceptance by Salt Lake of your offer to purchase?

“A. Yes, we asked him.”

Are you following me there?

A. No. What line?

Q. I started on line—I passed over the objection of counsel there, but I started at line 21 on page 14.

A. You said page 15, I understood. Yes, sir.

Q. I will read it again and you follow it:

“Q. Did you have any conversation at that time with Mr. Carron concerning an acceptance by Salt Lake of your offer to purchase?

“A. Yes, we asked him. [174]

“Q. We—you were the only one on the telephone, weren't you?

“A. You are talking about the day we took the inventory?

(Testimony of Albert C. Arthur)

“Q. No, the telephone conversation.

“A. Oh, the day of the telephone conversation we just talked about the preparation for the inventory.”

You so testified, did you not? A. Yes, sir.

Q. (Reading):

“Q. And on that occasion Mr. Carron did not state to you that Salt Lake had accepted the offer?

“A. I asked him if Salt Lake had accepted the offer and he said we would have to take an inventory first and send it to Salt Lake.”

You so testified? A. Yes, sir.

Q. All right. Now, let us go over to page 17 and I will start on page 4—

The Court: Page 4?

Mr. Mullinger: Page 17, line 4.

Q. By Mr. Mulliner: (Reading)

“Q. Was there any conversation after the three of you had met at the Carnation place concerning the sale of the property?

“A. I asked him if this deal had gone through.”

Did you so testify? [175] A. Yes, sir.

Q. At that time did you think it might have gone through?

A. I would keep on asking every time I saw him.

Q. What is it?

A. I kept on asking him every time I saw him.

Q. Why did you ask him?

Mr. Wilson: I object to it as immaterial and argumentative.

The Court: Overruled. Why did you ask him?

(Testimony of Albert C. Arthur)

The Witness: Well, I had \$4,300 invested and I would kind of like to know—

Q. By Mr. Mulliner: Well, you asked him because you kind of thought it might have gone through and you wanted to find out? A. Exactly.

Q. Isn't that true?

The Witness: Yes, sir.

The Court: Let us read the rest of this on that same page 17:

"A. I asked him if this deal had gone through.

"Q. You asked Mr. Carron?"

Read on down through to line 17.

Mr. Mulliner: (Reading)

"Q. You asked Mr. Carron?

"A. Yes." [176]

You mean on from where I left off there, your Honor?

The Court: All right.

Mr. Mulliner: (Reading)

"Q. What did he say?

"A. I gave him a reason that I wanted to know one way or the other because if the deal has gone through I wanted to hire the manager of that apartment, and he says 'No, the deal has not gone through and I don't want you to make any remark to the manager of the apartment that she is to make any kind of a change.'

"Q. Was there anyone present at this conversation other than Mr. Estes?

"A. That is all.

"Q. Just the three of you?

"A. That is right.

(Testimony of Albert C. Arthur)

“Q. Was there any other conversation at that time—this is before you went to take the inventory?

“A. We ate and talked there for an hour.

“Q. But so far as you can remember nothing else was discussed about the sale or about Salt Lake’s acceptance or about an escrow or anything except the actual taking of the inventory?

“A. Yes, I asked him if the deal was through and he said ‘No, the inventory has to go to Salt Lake to be approved before Salt Lake can give their answer’ and then is when—”

Well— [177]

The Court: Finish the sentence while you are at it.

Mr. Mulliner: I will do it but I don’t want to introduce something in the cross examination on another subject.

The Court: All right.

Mr. Mulliner: (Reading)

“—then is when he brought up the case of the other apartment where they had a larger inventory than their records showed.”

Q. By Mr. Mulliner: Did you so testify?

A. Yes, sir.

The Court: How much longer will you be with this witness?

Mr. Mulliner: Just about three minutes, I think. Since I have looked at the clock, I will say five minutes if that is all right.

Q. By Mr. Mulliner: At that time Mr. Carron told you, did he not, that these papers to close this escrow had to come from Salt Lake, the inventory as well as the other papers?

(Testimony of Albert C. Arthur)

Mr. Wilson: Where do you read that?

Mr. Mulliner: I am not reading it. I am just asking it.

A. May I have the question again?

Q. By Mr. Mulliner: If at the time the inventory was completed Mr. Carron did not tell you that?

(The previous question was read.)

A. Yes, sir.

Mr. Mulliner: I think that is all. [178]

Mr. Wilson: Your Honor, I would like to ask a few questions but it would probably take longer than we have available now.

The Court: Go ahead. Have you any more rebuttal?

Mr. Wilson: No other.

The Court: Have you any sur-rebuttal?

Mr. Mulliner: We will have one or two questions directly on these matters that they have testified to.

The Court: Well, what I am trying to get at is this, I would like to know what time we can finish. My wife is ill in bed and alone so I would like to finish as early as I can this afternoon and get home to take care of her.

Mr. Mulliner: We would have no objection to coming back earlier than 2 o'clock if Court and counsel have none.

The Court: 1:30?

Mr. Mulliner: That would be entirely satisfactory to us.

The Court: We will recess until 1:30.

(Whereupon a recess was taken until 1:30 p. m. of the same day, Thursday, January 11, 1945.) [179]

Afternoon session, 1:30 o'clock.

ALBERT C. ARTHUR,

called as a witness in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

Redirect Examination

Q. By Mr. Wilson: Mr. Arthur, will you examine your deposition beginning on page 6, line 18, and read down to page 8, line 20?

Mr. Mulliner: Just a moment.

Mr. Wilson: Just read it to yourself, of course.

A. (Witness complied.)

Q. Have you done so? A. Yes.

Q. On the occasion stated previously, namely, the taking of your deposition, did you testify as follows:

"Q. Both of them stated that to you?

"A. That is right. Neither one of them had the power to make any kind of a deal with me or Mr. Estes and that all we could do, as they said, to start the deal rolling was for us to sign a blank which was an option to buy and only subject to Salt Lake's approval. They themselves could not give us any kind of an answer.

"Q. Was there any discussion at that time concerning an inventory of the property? [180]

"A. They mentioned that an inventory would have to be taken.

"Q. And was there any discussion as to when the inventory would be taken?

"A. They were to let us know at some future date.

(Testimony of Albert C. Arthur)

"Q. Was that date to be fixed upon the happening of any other events?

"A. Not that I recall.

"Q. They did not state—neither Mr. Carron nor Mr. Sullivan stated to you that after Salt Lake had approved the transaction that then the inventory would be taken?

"A. No, they told me the other way around. Salt Lake could not give their answer until after the inventory was taken.

"Q. You say 'they'—

"A. Speaking of Carron and Sullivan.

"Q. Do you know which it was, Mr. Carron or Mr. Sullivan?

"A. They were together. I would have no way of knowing which one.

"Q. All right—proceed.

"A. They referred to some other apartment house deal whereby the inventory was the element that kept the deal from going through because they found more blankets and bedding in the inventory than what Salt Lake showed and Salt Lake turned the deal down, and that was the reason that no deal could be made with us until after the inventory was sent to Salt Lake [181] and approved by them.

"Q. They did not advise you that the inventory was to be taken after Salt Lake's approval?

"A. It was the other way around.

"Q. And was there any discussion at that time about an escrow?

"A. There was to be an escrow after Salt Lake approved the deal."

Did you so testify?

A. Yes, sir.

(Testimony of Albert C. Arthur)

Q. Will you also, in like manner, refer to page 18, line 5 to line 14?

A. (Witness complied.) Yes, sir.

Q. Have you read it? A. Yes, sir.

Q. Will you also read the preceding question and answer, Mr. Arthur, beginning on page 17, line 22?

A. (Witness complied.)

Q. You will observe in the preceding question and answer which was read to you this morning, beginning on line 2 of page 18:

“* * * then is when he brought up the case of the other apartment where they had a larger inventory than their records showed.”

Q. Do you observe that? A. Yes, sir. [182]

Q. Now, is the other apartment referred to in that portion of your answer the apartment of which you had previously spoken in the preceding question and answer?

A. State that question again, please.

(Question read.)

A. Yes, sir.

Q. By Mr. Wilson: Now, then, continuing on page 18, line 5, did you testify as follows in response to the following inquiries:

“Q. Do you recall him mentioning the name of that apartment or where it was located?

“A. I did not ask him the name of the apartment.

“Q. You don’t know whether it was Los Angeles or San Francisco or where?

“A. No. He used that as an example to prove to me that it would be impossible to give a definite answer on this apartment until Salt Lake had the papers approved

(Testimony of Albert C. Arthur)

from down here which took in the inventory as well as whatever legal papers they had to have."

You so testified, did you? A. Yes, sir.

Mr. Wilson: No other questions, your Honor.

Mr. Mulliner: No questions.

The Court: Step down.

(Witness excused.)

The Court: By the way, in the pre-trial memorandum [183] submitted by the defendant as a proposed exhibit was an escrow instruction. I don't find that in the exhibit which was offered here as Defendant's Exhibit E, which I understood to be all of the papers that were deposited in escrow. It is attached to the pre-trial memorandum and designated there as Defendant's C. It is on a printed form addressed to the Security Title & Insurance.

Mr. Mulliner: I will have Mr. Sullivan explain that to your Honor.

The Court: I think counsel could make a statement.

Mr. Mulliner: Well, it is a paper that was drawn up over at the bank on one of their forms and I don't know whether it was used or not. It is supposed to carry the same instructions that are in our letter, and we do it by letter.

The Court: I understand, but it was offered here as a proposed exhibit. If you don't want to offer it—

Mr. Mulliner: I don't know whether it was used or not in this case.

Mr. Perelli-Minetti: I think that was my error. I picked up the file and there was the form and I automatically submitted it rather than the letter.

The Court: Very well. Is that all? Do you rest?

Mr. Wilson: Yes, your Honor.

The Court: Sur-rebuttal?

Mr. Mulliner: Yes, your Honor. Mr. Carron, will you take the stand? [184]

JAMES CARRON,

called as a witness in behalf of the defendant in sur-rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. By Mr. Mulliner: Mr. Carron, I will ask you if on April 1, 1944, at the place this offer to purchase was signed and either before or after the signing of it, you stated in substance or effect that the inventory would have to be taken or sent to Salt Lake before any acceptance or approval of the deal could be received.

A. Do I understand the question correctly that the inventory would have to go in prior to acceptance or rejection?

Q. Yes. A. No, we never did that.

The Court: What? You never said anything like that?

The Witness: No, I never said anything like that.

Q. By Mr. Mulliner: I will ask this: Did you on May 8th make any such statement in substance or effect that the inventory had to be taken and sent in before there would be any acceptance or approval from Salt Lake to either of these plaintiffs?

The Court: May 8th?

Mr. Mulliner: Yes.

(Testimony of James Carron)

The Court: You mean April 25th?

Mr. Mulliner: I am asking it on May 8th because they [185] indicate that he was there on May 8th. I don't mean May 8th. I mean April—let me correct that. I mean April 26th, that is right. I will withdraw that date of May 8th.

Q. By Mr. Mulliner: On April 26th at the time that the inventory was signed did you make any such statement in substance or effect?

The Witness: Will you repeat that?

(Question read.)

The Court: You better reframe your question, Mr. Mulliner.

Mr. Mulliner: Yes. Let me withdraw that.

Q. By Mr. Mulliner: I will ask you if on or about April 26th, at the time this inventory was taken or signed, you stated to either of these plaintiffs in substance or effect that the inventory would have to go in to Salt Lake before there would be any acceptance or approval of this deal?

A. No, nothing was ever said along that line.

Q. You say you never said anything like that to these parties at any time or place?

A. Not to the effect that the inventory had to go in to Salt Lake before it was accepted, no.

Q. I will ask you now if on or about April 1, 1944, and at or about the time that this offer to purchase was signed, you referred to some other apartment house deal where the inventory was involved and stated in substance or effect that the deal did not go through because when the inventory was [186] taken there were more blankets and bedding in the inventory than what Salt Lake had showed and that Salt Lake turned the deal down and that

(Testimony of James Carron)

no deal could be made with them until after the inventory was sent to Salt Lake and approved by them? Did you make that statement in substance?

A. I never made any such statement of that kind. Nothing like that was ever discussed.

Q. Did anything like that ever happen in your experience with the Western?

A. Not to my knowledge, no, sir.

Q. That there was any turn-down over any inventory being taken or any question of any blankets or bedding being there?

A. Nothing. Nothing like that ever happened.

Q. You did not make any such statement at that time or any other time or place?

A. No, sir.

Q. When you did take the inventory, state whether or not the apartments in this apartment house were occupied.

A. They were all occupied. At least, there was a tenant assigned to each apartment. The tenant may not have been in at that particular time but the apartments were all sold.

Q. Did you ever take an inventory on any sale for this company where the inventory was taken before the acceptance?

A. No, we never did that.

Mr. Wilson: I object to it as immaterial. [187]

The Court: The answer may be stricken. The objection is sustained.

Mr. Mulliner: You may cross examine.

Mr. Wilson: No questions.

The Court: Step down.

(Witness excused.)

Mr. Mulliner: Mr. Sullivan, will you take the stand?

F. E. SULLIVAN,

called as a witness in behalf of the defendant in sur-rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Mulliner: Mr. Sullivan, I will ask you if on or about April 1, 1944, at San Bernardino, or at any other time or place, you ever stated to these plaintiffs, or either one of them, in substance or effect that there had to be an inventory taken and sent in before you could get approval or acceptance of this deal from the Salt Lake office? A. No.

Q. I will ask you if anything was ever said by you or in your presence relating to some other apartment house deal whereby the inventory was involved, that is, any statement with reference to this matter in connection with this transaction and that more blankets and bedding were found in the inventory than what Salt Lake showed and that Salt Lake turned down the deal for that reason? [188]

A. That never happened.

Q. Did you ever hear of any statement of that kind?

A. No, sir.

Q. Or ever hear any statement of that kind?

A. No, sir.

Q. Was there ever any such thing as that that happened? A. Not to my knowledge. I never heard of anything like that ever happening.

Q. I will ask you now, Mr. Sullivan, to state if you can of your own knowledge whether or not the Salt Lake office prior to April 22, 1944, had an appraisal on this property, including a separate appraisal on the furniture?

A. Yes, they did.

(Testimony of F. E. Sullivan)

Mr. Wilson: Wait just a minute, please. Have you finished the question?

Mr. Mulliner: I was going to ask another part of it but I will stop there and accept the answer.

Mr. Wilson: I don't want the answer. I want to have a chance to object.

The Court: The answer may be stricken for the purpose of objection.

Mr. Wilson: Objection on the ground it is incompetent, irrelevant, and immaterial, not the best evidence, and no foundation has been laid for it.

Mr. Mulliner: I was continuing to lay the foundation.

The Court: Objection overruled. [189]

Q. By Mr. Mulliner: Your answer is what to that part of the question?

A. Yes, they did have.

Q. I will ask you if that was by one of the appraisers approved by the Building and Loan Commissioner of the State of California to appraise properties for sales by Building and Loan Associations?

Mr. Wilson: The same objection, if your Honor please.

The Court: Overruled. Let me see. Your answer to the previous question was that the separate appraisal of the furniture and the house was made before April 21st?

The Witness: Yes.

The Court: After April 1st?

The Witness: After April 1st, that is correct.

The Court: Did they have an inventory when they made the appraisal?

The Witness: Of course, the appraiser goes in and makes his own inventory. The home office would have the inventory and they would know the furniture that is in that building.

(Testimony of F. E. Sullivan)

Q. By Mr. Mulliner: Do you know whether the appraiser actually makes an inventory? A. No.

Mr. Wilson: The same objection, if your Honor please, not the best evidence.

The Court: Overruled. The witness says he does not know. [190]

Q. By Mr. Mulliner: Who was that appraiser?

A. George L. Schmutz.

The Clerk: K for identification.

The Court: Do you want to show it to counsel?

(The document was handed to Mr. Wilson.)

Q. By Mr. Mulliner: I show you what has been marked for identification as Exhibit K and ask you if that is the appraisal report that you just referred to?

A. (After examining) Yes, it is.

Q. Can you indicate the page on which the furniture or furnishings is set up separately?

A. It is on this page here, "Replacement Cost."

Q. And what is the item there?

Mr. Wilson: I can't hear you gentlemen very well over here.

A. It is on a page that has a heading "Replacement Cost." The page is No. 4, and the furnishings as is—

Mr. Wilson: Just a minute. You have answered the question.

Mr. Mulliner: What was your suggestion, Mr. Wilson?

Mr. Wilson: He has answered the question. I didn't want him to read the document.

Mr. Mulliner: I was locating the item.

Q. By Mr. Mulliner: It is listed there as what?

A. "Furnishings 'as is' \$6,000."

Mr. Mulliner: We offer this. [191]

(Testimony of F. E. Sullivan)

Mr. Wilson: We object to it on the ground it is incompetent, irrelevant, immaterial, hearsay, and no foundation laid for it.

The Court: It is admitted, but not on the issue of liquidated damages.

[DEFENDANT'S EXHIBIT K]

Appraisal Report

NORMAN MANOR

and

NORMAN MANOR ANNEX

N. E. Cor. "E" & 17th Streets

San Bernardino, California

Real Estate 4427 & 4430

* * *

GEORGE L. SCHMUTZ

Realtor Appraiser

4725 Ledge Avenue

North Hollywood, California

April 18, 1944.

Western Loan and Building Company.

308 West Olympic Boulevard,

Los Angeles, 15, California.

Re: Norman Manor Apartments

and

Norman Manor Annex

N. E. Cor. of "E" and 17th Sts.

San Bernardino, California

Real Estate 4427 & 4430

Gentlemen:

Pursuant to your request, I have personally inspected the above mentioned property which is more particularly described elsewhere herein.

(Defendant's Exhibit K)

By reason of my investigation and by virtue of my experience I have been able to form and have formed the opinion that the fair market value of the said property, as of this date is—

—Eighty Thousand Dollars (\$80,000)—

Your attention is invited to the data and discussion here following.

Respectfully submitted,

George L. Schmutz

GLS:ef

DISCUSSION

The District

The Norman Manor Apartment is located in the better residential district of a decade or two ago. The property is situated on the principal north and south commercial street although about a dozen city blocks to the north of the downtown shopping area, and only a few blocks from the Base Line Shopping District. In the intervening areas are scattered infiltrations of commercial enterprises replacing old residences. However, the old residences form the major part of the land usage.

The Land

The subject land is legally described as Lots 13, 14, and 15 in Block "E", The Palms, City of San Bernardino, County of San Bernardino, State of California.

The land comprises the northeast corner of "E" and 17th Streets. It has a frontage of 200-feet along the east side of "E" Street and a frontage of 150 feet along

(Defendant's Exhibit K)

the north side of 17th Street. It is bounded on the north by a 20-foot alley.

The land is level with the sidewalk. All public utilities are installed. Both streets are paved and have concrete sidewalks and curbs.

The Land (Cont)

The side is attractively landscaped with a spacious lawn and Lombardy Poplar trees.

If vacant, the land would have a probable value of \$12,000 if building materials were available.

* * *

The Structures

There are 2-separate buildings on the land. The Norman Manor Apartment, the building on the corner, is 132 feet wide, along 17th Street, and 89-feet deep, along "E" Street. It is "U" shaped with the hollow part, 44' x 49', which is the entrance court that faces 17th Street. The gross area of the 2-floors is 19,236 square feet.

This building is a 2-story Norman style structure of frame and stucco construction. The roof is flat and covered with roll composition roofing except for the Mansard type edging which is covered with wood shingles.

Excepting the entrance lobby, which has a marble floor, all floors are pine covered with carpet. The walls and ceilings are plastered. The baths have tile floors and 3-plumbing fixtures with showers over the tubs. There is a built-in electric refrigerator in each kitchen which is

(Defendant's Exhibit K)

cooled by a central unit in the basement. There are gas-steam radiators in each living room. There is a central

The Structures (Cont)

hot water plant and 2-laundry trays in the basement.

The structure was completed in 1928. The outside walls and trim are in need of paint. There are flashing leaks and this has damaged several of the apartments. At least 6 of the apartments are in considerable need of re-decoration.

The carpets in the halls are bad. In 9 of the units the carpeting is good, in 5 it is bad and, in the other 16 it is only fair. The gas ranges and built-in refrigerators appear to be the original installations—16 years old. While still serviceable yet they are tolerable today only because of the acute housing shortage.

The Annex is of the same age, type of construction, and condition. It is a 2-story building with a frontage of 44 feet along "E" Street and 94 feet deep. The rear width is 38 feet. The gross area of the two floors is 7,312 square feet.

The roof of this structure is bad and has adversely affected 4 of the rental units. At least 4 of the apartments are in need of redecoration. The carpets in 2 are good, in 2 they are bad, and in the other 8 they are only fair.

In general, what has been said about the Norman Manor applies also to the Annex.

There are no garages for either of the buildings.

Replacement Cost

The probable cost less depreciation of the said property is as follows:

(Defendant's Exhibit K)

<u>Land</u>	—	\$12,000
<u>The Structures</u>		
26,548 sq. ft. @ \$4.50	\$119,466	
less depreciation		
16 years—48%	57,344	
Depreciated Cost	\$ 62,122	
Furnishings "as is"	6,000	
Sub-total	\$ 68,122	68,122
Total	—	\$80,122

* * *

The Income and Expenses

The current rental schedule of this property, both structures, is as follows:

Norman Manor

<u>Units</u>	<u>Rent</u>	<u>Per Month</u>	
9-dbl.	\$45.00	\$ 405.00	
1-dbl.	42.50	42.50	
1-dbl.	40.00	40.00	
1-dbl.	45.00	45.00*	
1-sgl.	27.50	27.50	
2-sgl.	30.00	60.00	
10-sgl.	32.50	325.00	
5-sgl.	35.00	175.00	
30-units		\$1,120.00	\$1,120.00

(Defendant's Exhibit K)

Annex

1-sgl.	27.50	27.50
6-sgl.	30.00	180.00
3-sgl.	32.50	97.50
2-sgl.	35.00	70.00
<hr/>		
12-units	\$ 375.00	375.00
<hr/>		
Total per month		1,495.00
Total per year		\$17,940.00

Note. The reported collections for the year 1943 were \$18,139.94. This included the manager's apartment shown thus—*.

* * *

Income and Expense (Cont)

The house furnishes, as a part of the rent, the cost of all public utilities and maid service twice a month. The reported expenses for 1943 were as follows:

Salaries	—	\$3,412.56
Fuel	—	806.80
Electricity	—	939.44
Water	—	332.45
Power	—	214.58
Laundry	—	102.35
Telephone	—	70.79
Supplies	—	49.79
Replacements & Maint. Bldg.	—	253.99
Taxes	—	2,444.80
Insurance	—	272.19
Repl. & Maint.—Furn.	—	231.77
Misc.	—	158.00

(Defendant's Exhibit K)

Painting	—	36.42
Garage rent	—	32.50
Commission	—	1.68
<hr/>		
Total	—	\$9,360.11
<hr/>		

* * *

The Value Conclusion

Transactions in the market indicate a probable sale price of—

- a) 4.7 times the rental schedule, and
- b) 9.0 times the net income.

On these bases the indicated probable sale price is,—

- a) 4.7 times \$18,000 being \$84,600.00
- b) 9.0 times 8,600 being 77,400.00

* * *

The Value Conclusion (Cont)

Thus, on the basis of income the value appears to be about \$80,000. The cost estimate as hereinbefore shown, indicates a figure of \$80,122. From these data it is concluded that \$80,000 is representative of the fair market value.

* * *

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Defts. Exhibit K. Date Jan. 11, 1945. No. K in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Mr. Wilson: No questions.

The Court: Step down.

(Witness excused.)

Mr. Mulliner: We rest, your Honor.

The Court: Do you rest again? Everybody rests?

Mr. Wilson: Yes.

The Court: All right. I think, Mr. Wilson, that I would like to hear from the defendants in connection with the matter. I have read your briefs and memorandums submitted in connection with this. Will you touch in your argument on the proposition as to how under the law, assuming that Mr. Carron's testimony is true, that he 'phoned Mr. Estes or Mr. Arthur on April—whatever date it was—how that constitutes an acceptance when there was then no inventory, nothing upon which a bill of sale could be drawn, when there was never anything which was given to the plaintiffs in writing signed by any official or any person representing or purporting to represent the Western Loan & Building Company, whatever its name is?

Mr. Mulliner: Your Honor, I was wondering, in view of your Honor's situation as stated this morning, whether it would [192] be preferable to file briefs.

The Court: I don't think so. The pre-trial memorandums were filed and I would rather dispose of the matter today while the testimony is fresh in my mind.

Mr. Mulliner: Mr. Perelli-Minetti will argue that point of law to your Honor. Perhaps it is not necessary, but I was going to comment a little upon the question of fact as to whether or not there really was such an oral acceptance and notification.

The Court: Let us assume that there was such an oral statement.

Mr. Mulliner: Well, then, perhaps I better not burden your Honor with that and just let counsel argue the law question.

Mr. Perelli-Minetti: I think your Honor's question relates perhaps to the statute of frauds, and I think that most of us—I know I was before I got into this case—are of the opinion that there must be a writing, a written agreement, before the defendant can be successful in an action of this type, and I think it stems from the statute of frauds and from the fact that we know in the preparation of deeds, mortgages, and things of that nature, that there must be an exact certainty of description. Otherwise the deed or the conveyance will fail.

Here we have not a conveyance nor an attempted conveyance but we have what for all practical purposes is nothing [193] but an oral agreement. In other words, Mr. Estes and Mr. Arthur come and say to us in effect, "We will buy the *Noraman* Manor Apartments. We will give you \$86,750, so much down and so much payable over a period of time. That if accepted at that time is sufficient.

The case of *Harper v. Goldschmidt*, 156 Cal. 245, involved the basis of the question, or at least one basis of what I deem to be the Court's query, and in that case the vendor of real property attempted to specifically enforce a sale of land. The only instrument in writing was a receipt and a contract, a receipt of the down payment which had been made by vendee or the purchaser, and the contract of sale which he had signed and presented to the vendee. The court held, and it is an exhaustive opinion—I think that the Supreme Court's words at the

beginning of the case were something along these lines, that such a contrariety of opinion on this subject, the Statute of Frauds, should exist, excites comment, and we shall resolve forever these doubts, or we shall attempt to resolve the doubts, and then they go on with the case and the court holds in that case that the vendor could not specifically enforce that agreement.

That is not our case, but with reference to the Statute of Frauds the court states:

“Before the Statute of Frauds, an oral agreement could be proved against either party. The Statute of Frauds in no way interfered or attempted to interfere with the antecedent [194] oral agreement, but, in effect, declared a rule of evidence that such agreement could not be proved unless the essentials of it had been reduced to writing and signed by the party to be charged.”

Then we come to the case—

The Court: Do you think the Western Building & Loan were to be charged here?

Mr. Mulliner: Not in this State.

Mr. Perelli-Minetti: Not in this State, your Honor.

The Court: Under that agreement weren't they one of the parties to be charged?

Mr. Perelli-Minetti: No. In that connection may I call your attention to another passage from the *Harper v. Goldschmidt* case, and I quote:

“The English Statute of Frauds and Perjuries of Charles II, to which the similar statutes of all our States owe their origin, used the phrase ‘party to be charged’ in precisely the same manner and to the same effect as it is now used in our sections of the Code. A glance at the English cases will establish that the ‘party to be

charged' did not mean the vendor, nor yet the vendee, but it meant the person charged in court with the performance of the obligation—the party defendant.”

If we had here a suit for specific performance we might have another question, but here we have a written offer which contains the terms, which contains the description of the [195] property, and, although that is not in issue in this case, any defense which might have been based upon lack of mutuality in a specific performance suit would have been eliminated by the mere fact that we came into court and attempted to compel specific performance.

Now, getting to an exact case, a case on all fours, and that is what we lawyers search for, I call to the Court's attention the case of *Laffey v. Kaufman*.

The Court: That is cited in your memorandum?

Mr. Perelli-Minetti: That is correct, your Honor. In that case there was not one single piece of writing, there was a pure oral agreement. The vendor said, “I will sell for so much”, and the vendee said, “I will accept”, and the vendee paid under that oral arrangement \$500 down on a \$1,500 purchase price, the balance to be paid by notes secured by mortgage. The vendee, or the plaintiff, just like Mr. Arthur and Mr. Estes in this case, refused to complete the contract, they refused to pay the balance, and sued for the return of the \$500 down payment, which corresponds to our \$4,337.50. The trial court gave judgment for the plaintiff and it was reversed in the Supreme Court and it is still the law of this State, it has never been set aside nor modified that I know of, and from this I quote:

“We think the court—” the trial court—“was in error in overruling the demurrer and in refusing to hear de-

endants' evidence. The action is not one to enforce the [196] specific performance of a parol contract for the sale of lands, nor is it one in which a defense is based upon the Statute of Frauds.

"The plaintiff, having made the contract, which is not unlawful—" this is not an OPA contract—"nor against public policy, and having paid the money thereunder,—" just as Estes did here and Arthur—"cannot, of his own volition, and without fault of defendants, come into court and receive the assistance thereof to recover the money voluntarily paid. The money was paid for a valid consideration,—to-wit, the agreement to convey the land."

Further on:

"The right of the vendee of land, under a verbal contract, to recover the money or other consideration paid is by all the authorities confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part." Citing a number of cases.

That is our situation. We have an action here which is based in a large degree, in reading the pre-trial brief of the plaintiffs, upon equity and good conscience, and in that connection I call to the Court's attention the bottom of page 3 of the plaintiffs' pre-trial brief under Point II:

"The common count of money had and received—" and I read from the brief—"is the appropriate remedy.

"In 17 Cal. Jur. 602, it is said: [197]

"The basis of the action for money had and received is that the defendant has money which in equity and good conscience he ought to pay to the plaintiff. And, generally speaking, the action lies in all cases where one

person has in his possession money which in equity and good conscience he ought to pay over to another.' ”

The brief then goes on to refer to another case where good conscience and equity are mentioned.

Now, we have two people, a company and two purchasers, who, after you boil down the manner in which the acceptance was given and the time which elapsed, which was necessary and which was planned upon by the parties, we have the purchasers saying, “We will buy this from you for so much money.” And we have the Western Loan & Building Company saying, “We will accept.” That, your Honor, we believe, is sufficient under our California law.

We have under that arrangement a new assumption of facts which we are now discussing, a vendee admitting that position and yet asking this Court—

The Court: Do you think that Mr. Carron’s communication to them was a legal acceptance?

Mr. Perelli-Minetti: Yes, your Honor. There is nothing that compels us to write. It might have been better judgment.

The Court: He had previously stated to them that he had no authority to act.

Mr. Perelli-Minetti: That was prior to April 24th, [198] when he telephoned and said, “Salt Lake has accepted.” He then communicated the acceptance from the home office.

The Court: That is what he said, but he had previously said that he had no authority to act. He never offered to show them anything. This Exhibit I, which is in evidence, does not indicate that this is an acceptance of that offer:

"Sale of the above properties as outlined in your letter of April 5th is approved."

I don't know what that may mean. It might be a sale to anybody for \$86,000 or any other sum. It says, "Sale of above property."

Mr. Mulliner: May I remind your Honor that Mr. Sullivan testified that it was an authorization to sell this property?

The Court: All right, that is what Mr. Sullivan says, but he says he hasn't any authority either. This is the only thing that has been produced from the Western Building & Loan by any person who has any authority to accept the sale.

Mr. Mulliner: On the 8th and before this was withdrawn and before the closing date we told them again that we were ready to close and the closing papers were there to close.

The Court: But you didn't tell them before the 1st except that if Mr. Carron's communication is an acceptance.

Mr. Mulliner: That would not make any difference if this is what they say it is, an offer. It had never been withdrawn.

The Court: It was limited to May 1st. [199]

Mr. Mulliner: No, I don't think so, your Honor. That is another legal point that we have.

The Court: Tell me about that one then.

Mr. Mulliner: There was nothing, as I interpret it, in that contract which forecloses that offer, if it was an offer, on May 1st. It was irrevocable, it could not have been withdrawn before that date.

The Court: I see your point.

Mr. Mulliner: You see, we went on and took this inventory late in April and told these parties that it had to be assembled and typed up and sent in to Salt Lake to be incorporated into the chattel mortgage and sent back here, so there could have been no thought in anybody's mind that it would be back by May 1st.

Mr. Perelli-Minetti: In that connection, may I call to your Honor's attention at page 4 the same interpretation which was placed upon that phrase by the plaintiffs, at line 23.

The Court: Page 4?

Mr. Perelli-Minetti: Page 4 of the plaintiffs' pre-trial brief:

"If the offer was withdrawn after May 1st and prior to acceptance—"

The Court: I see.

Mr. Perelli-Minetti: (Continuing)

"—the money was to be returned."

Plaintiffs themselves take the position that the offer [200] extended beyond May 1st. The irrevocable part of that offer was simply up to May 1st.

There is also in that offer, if you will notice, a closing date of May 15th, and I think, for the purpose of argument, which we do not concede, but simply for the purposes of argument, that even though a time limit is fixed as of May 1st, yet the parties can by their acts waive the time limit. Now, here the testimony was clear that on the 26th there was knowledge that the papers had to go to Salt Lake, that escrow papers had to come from Salt Lake, that Mr. Carron was leaving—

The Court: I really don't think, counsel, under the evidence, and I have followed it very carefully, that there

was any acceptance of this offer before May 1st. In the whole nature of the transaction, I don't see how you are going to give a bill of sale and give a chattel mortgage until you have an inventory and know what is going to be in the bill of sale.

Mr. Mulliner: That we agree with. The bill of sale and the chattel mortgage required the inventory, and that is why we took it.

The Court: Would they have to have the inventory in order to make the bill of sale?

Mr. Mulliner: That is right.

The Court: If the offer had been accepted before the date of the inventory, it would have been a very easy thing [201] to have communicated the formal acceptance and opened an escrow and demanded the inventory in the escrow if it was not the intention of the parties to say that this inventory was taken to be submitted to Salt Lake City before it was finally accepted.

Mr. Mulliner: If your Honor will pardon me, that is based upon the proposition that your Honor does not believe that Mr. Carron called and gave some acceptance to Mr. Arthur?

The Court: Well, I don't know. I am not sure but what Mr. Carron's memory might not be completely accurate in that respect. It seems to me that if he had done that and then went out to San Bernardino for two days, being there with the parties taking an inventory, he would have said something about it again.

Mr. Mulliner: The very fact that they were known to take the inventory, your Honor, and to go into every one of these individual apartments and disturb those tenants is a circumstance indicating—

The Court: If it had been accepted, Mr. Carron or somebody would also have had authority to sign this

inventory with these parties here, if the deal had been accepted when this inventory was taken, but the fact that nobody signed this for the Western Loan & Building Company right while they were taking it and looking at it is an indication to me that it was not accepted.

Mr. Mulliner: You see, your Honor, we were selling to [202] these people and all we wanted was that they were satisfied with the inventory that they were getting which was to be incorporated in their bill of sale and which they were giving back to us in a chattel mortgage.

Now, you see, we have in addition to that, the fact, as I read from Mr. Estes' previous testimony, that he said that Mr. Carron had said to him that there was a telephone call of acceptance. I am giving the substance of it. Mr. Carron had to make that before May 1st because Mr. Carron was never there after April 29th. I am just discussing now the probability of the statement of Mr. Carron being true. The fact that they did go on and pursue it, the fact that one of the plaintiffs practically admits it, and the fact that the authority to accept came on that day, and the other things, fall in sequence, the fact that the telephone record shows that there was a call to Mr. Arthur.

The Court: There were several calls. The plaintiffs admitted that they had made several calls.

Mr. Mulliner: No; from our office to Arthur on that day. We feel that those circumstances are persuasive as to the facts.

Now, as to whether or not, if that was done in the way that Mr. Carron says, it constituted an acceptance, that is a matter—

The Court: I don't think, counsel, I care to waste any more time on the question of whether or not there was in fact [203] an acceptance before May 1st. I

don't believe under the evidence that I will be justified in holding that there was an acceptance by the defendants here before May 1st or that that acceptance was communicated to the plaintiffs here.

Mr. Perelli-Minetti: If we had, your Honor, if I may interrupt you, a case here where the inventory were a substantial portion of the transaction, then perhaps the inventory would have been indicative of the status of the sale or the acceptance or the non-acceptance, but here we have a transaction, a sale of \$86,750, and we have an inventory of \$6,000. While it is a lot of money, and it is a lot to me, it is a relatively small—

The Court: It is 8 per cent, about, and 8 per cent of anything is a big per cent when you can only get $\frac{1}{2}$ of 1 per cent on your money when you invest it.

Mr. Perelli-Minetti: That is in banks, your Honor.

Mr. Mulliner: Of course, we had an appraisal on that by an official appraiser in addition to our other information. These people did not need that inventory to make this offer because they made it without it, and we did not need it in order to accept it because we had this appraisal as to value. It did not matter how many teacups or how many sheets there were so long as we had the approximate value of it in accepting the offer.

The Court: All right, let us go to your other point now.

Mr. Perelli-Minetti: Even if, for the purpose of [204] argument, there was not an acceptance prior to May 1st, the offer did remain open, it was not irrevocable but it did remain open, after May 1st. On May 9th Mr. Sullivan deposited the papers in escrow and the company was irrevocably committed. The letters and the telegrams of revocation or repudiation, whatever we may call them, were not received—

The Court: He admitted he had been informed of the fact the previous day.

Mr. Mulliner: Yes, he tendered them on the 8th but he didn't take them over there—

The Court: He called up on the 8th on the 'phone and said Mr. Arthur told him he would not go through with the deal and that a telegram had been sent to him advising him to that effect, and he prepared this on the morning of the 9th, his letter on the morning of the 9th.

Mr. Mulliner: But apparently it is quite obvious that the telegrams were not sent.

The Court: They were received at 9:15 in the morning and read to him over the telephone, but he dictated this letter, and that is his testimony.

Mr. Mulliner: That is true as to the letter, but this telephone conversation was on the 8th. The telegram which came here was not received here until 10:13 in Los Angeles the night of the 8th and not communicated until 9:21 the next morning.

The Court: I understand, but after he received the [205] telegram and after he had been advised of it and that the deal was revoked, he nevertheless then dictated the letter of transmittal and took over the escrow papers to the bank or whatever it is in San Bernardino.

Mr. Mulliner: The only point I am making here, your Honor, is that he tendered that performance and those documents before they had ever told him on the telephone that they were not going through with the deal. That is the only point I make.

Mr. Wilson: That is not correct.

Mr. Mulliner: That is correct, that he called him up and told him that the documents were here and they were prepared to close the deal and that he would be over to close it. Then it was that Mr. Arthur told him that they

had decided not to go through with it or something to that effect and that he should have had a telegram to that effect.

The Court: Go ahead.

Mr. Perelli-Minetti: That communication on May 8th by Mr. Carron would constitute sufficient acceptance. The acceptance—

The Court: By Mr. Sullivan?

Mr. Perelli-Minetti: By Mr. Sullivan. The verbal statement, "I have the papers from Salt Lake and we are going into escrow", and that followed by Mr. Arthur's statement that the deal was off—that of itself is sufficient. Mr. Arthur himself admitted that fact on the witness stand. [206]

The Court: Admitted what?

Mr. Perelli-Minetti: There is no controversy about the question of fact on that particular point.

I will call to your Honor's attention, if I may, in going back to April 24th, that Mr. Carron stated positively on direct examination yesterday that he did call and said, "Hello, Art; congratulations."

The Court: Don't waste any more time about before May 1st. I am satisfied of that. None of these papers are dated before May 5th anyhow by the home office in Salt Lake.

Mr. Mulliner: You see by the agreement the closing date was to be May 15th.

The Court: I know that, but none of them were drawn until after May 1st. None of them were drawn until May 5th and they are dated that date.

Mr. Mulliner: That is correct, your Honor, but the papers were drawn to take effect on the 16th, as provided by the offer.

The Court: Well, yes, to go into escrow before—you say here, at the end of the 14th, before the 15th. Well, I don't know, to me it narrows down to a proposition of whether or not—

Mr. Perelli-Minetti: May I interrupt, your Honor? I don't want to be obstinate.

The Court: Yes. Go ahead and be obstinate. I don't care. I get obstinate myself. [207]

Mr. Perelli-Minetti: I think it is significant that—if I may come back to the 24th—that Mr. Carron testified unequivocally that he called up and said, "Salt Lake accepts it. Salt Lake approves it." Not once, following that—and I think both plaintiffs were on the stand two or three times, I don't recall how many, everybody was rising and getting back—not once was any one of those plaintiffs asked nor did he testify that there was not that conversation. Not once was Mr. Carron asked on cross examination about that conversation. At the same time we have here all the time the continued statements by the plaintiffs to the effect that they were advised that the inventory must precede the acceptance or the considering of an acceptance re rejection by Salt Lake. Yet we also have between the 1st of April and the 24th several conversations asking if Salt Lake had accepted when the inventory had not been taken. Now, they must have known that the inventory was a side issue as far as acceptance was concerned. Otherwise, why would they ask? They knew that there had been no inventory and it was absolutely a useless act. They did not testify that they called up, one of them or both of them, at intervals of a week or two before the 24th, and said, "Let's get on with the inventory." We have nothing of that character. We have, on the contrary, their request as to whether or not there had been an acceptance. It fits in,

your Honor, with the probability. If the inventory was to precede or be a condition to passing upon an acceptance, why, [208] since it was a two-day job, wasn't it taken the first day or two? For the only reason that it was not necessary.

Mr. Mulliner: Or before the signing of the offer.

The Court: All right, go ahead.

Mr. Perelli-Minetti: There was another point your Honor had in mind when I interrupted him.

The Court: Well, that is a point that I think I would like to hear from Mr. Wilson on, and that is the point that you make, that the offer was still open after May 1st and that as a matter of fact the revocation of the offer was not made until after the acceptance on May 8th or May 9th.

Mr. Perelli-Minetti: May 8th, your Honor.

The Court: That is your point, on May 8th, but I don't know whether that can be called an acceptance or not. At least, I would like to hear from Mr. Wilson on it.

Mr. Wilson: These questions, your Honor, that bear upon the subject of acceptance are all addressed to one point, and that is, Was a contract formed? Was an agreement reached? Now, then, in order to reach an agreement it is not only necessary that one party make a decision but also that that decision shall be communicated to the other.

The Court: By someone with authority.

Mr. Wilson: By someone with authority, so that when everything is complete, this legal act that we describe by the word "acceptance" has been performed, both parties stand in reciprocal positions and that each could enforce the [209] contract against the other. If

there is not that certainty which is necessary to any contract then, of course, we do not have a contract.

So, my first point by way of explanation is this, that before we can say that there is or is not an acceptance, we must first find out who made the decision. There is no proof here that any person made any decision.

The Court: Well, it has got to be an acceptance of the offer as made.

Mr. Wilson: Yes, your Honor, that is obviously true. And within the time specified. It is said this offer is not a 30-day offer, that is, that there is no time limit and it does not expire by virtue of its express terms. All I can say is that differences of opinion might well exist with respect to the interpretation of the writing. My own interpretation is that when it says, "The Offerer hereby agrees that this offer shall remain open", that by implication at least he says it shall not remain open after the date specified. There are two conditions specified, namely, the fact that it remains open until the date specified and, furthermore, that it is not revocable until that time arrives. But I interpret this writing to mean that it is an offer for a limited period, and our testimony is that it was so understood. If it justifies the interpretation contended for by the defendant, all I can say of it is that we have here another element of uncertainty which, of course, is fatal to any contractual relationship. [210]

On this matter of authority—and I want to touch that briefly—the acceptance, as we have indicated, must come from a decision by one in authority, who in turn must transmit that decision to the person affected.

I observe in Exhibit 5, this being one of the listings, this sentence:

"All offers are subject to approval by the Executive Committee of Western Loan & Building Company."

Now, suppose that Mr. Carron or some other individual identified with that company in some minor capacity, at least not the Executive Committee, should come along and say or write, "The Executive Committee has done thus and so", that is not proof of the act of the Executive Committee. We must have proof of that corporate act just like we have proof of any corporate act, namely, by somebody who was present and either can tell us what transpired or by an official or appropriate corporate record can certify that such a corporate act took place.

The Court: Well, I think that those requirements of the law are satisfied by the execution of the deed dated May 5th, signed by the vice president and the secretary and bearing the corporate seal and duly acknowledged. I think that on that date I could indulge the presumption that the Executive Committee of the Western Loan & Building Company had approved the sale, but I don't think I could indulge that presumption beforehand because, while it is an officer, the general [211] manager, this is too indefinite, I think, to constitute evidence of acceptance of this deal.

All right, go ahead. Excuse my interruption. I wish I didn't interrupt lawyers so much when they are arguing.

Mr. Wilson: I appreciate your Honor's frankness and I think it is conducive to orderly and expeditious—

The Court: Also conducive to reversals of the Judge.

Mr. Wilson: I have felt and seen it during my experience that if we could understand what the trial judge

wanted us to touch on we might do so more quickly and more efficiently rather than talking to him at random.

The Court: I have often thought that when arguing a case.

Mr. Wilson: Getting back to our question here, my first point is, and I have already said it, that the offer is an offer with an express time limit of 30 days. If that interpretation be not sound, although we have testified that that was our understanding of it, nevertheless we did take steps to bring it to a conclusion before we were informed by anybody.

The Court: I don't go along with you on that interpretation of the offer, and I am inclined to believe that the plaintiffs' interpretation of it was indicated not to be that by their conduct in making the revocation.

Mr. Wilson: Your Honor, I am to blame for that. You cannot charge that to them. They came to me with their troubles and I assumed right off the bat that it was— [212]

The Court: That the first thing was to revoke that offer?

Mr. Wilson: As Earl Rogers one time said, out of a superabundance of caution, I thought, well, if I should be wrong, I will take the other angle and go ahead and make a revocation.

Now, we sent those out on the 8th of May. Assuming that the offer had not yet ended, it did end when we transmitted those revocations or those evidences of revocation.

Mr. Mulliner: May I just suggest to you that I think the law is that in the event of revocation—

Mr. Wilson: Could I continue, Mr. Mulliner, please?

Mr. Mulliner: Pardon me.

Mr. Wilson: The question arises whether Mr. Sullivan is correct or whether Mr. Arthur is correct when he says that Mr. Sullivan—Mr. Sullivan says he called him on May 8th, and assuming he did call on May 8th, there was nothing had from any authoritative course to indicate that there had been an acceptance. On May 8th we had never received any communication from anybody in authority.

The Court: I am inclined to think, counsel, that there was nothing communicated to the defendants of an authoritative acceptance of the offer until the receipt by them of the letter of May 9th, following the putting into escrow of these papers and documents executed by the officials of the Western Loan & Building Company. That, I think, was the first time [213] that the plaintiffs received from the defendants an acceptance of their offer. That is this Exhibit H and that was testified, I think—you stipulated it was received on May 10th. It bears the date of May 9th and it was testified it was put in the mail on May 9th. Following this, the deposit of these papers in escrow I think constituted an acceptance of their offer.

Mr. Wilson: If it was open for acceptance at that time.

The Court: If it was open to acceptance at that time. I don't think it was open to acceptance at that time. I

think that the knowledge of Mr. Sullivan the day before that the telegram had been sent, and the receipt of the telegram before he dictated that letter, was a revocation of the offer before its valid acceptance, and that will be the judgment of the Court.

Mr. Mulliner: Your Honor, may I just have your indulgence for a moment on this? Your Honor has stated that Exhibit I does not indicate that it was an acceptance of this deal. Exhibit I, your Honor will notice, refers to Mr. Sullivan's letter of April 5th. I would like at this time, if your Honor will permit me, to reopen merely for the purpose of introducing that letter. The way the case has proceeded, and the pleadings are so general, your Honor can appreciate it has been difficult to keep track of just what the issues were at every stage of this trial, and I would like merely to introduce that document so that the connection between that [214] and Exhibit I will show in the record.

The Court: Well, I suppose the case can be reopened for that. I don't think it would make any difference in my judgment because, as I have indicated, I think that the acceptance was when it was communicated by the letter of May 9th.

Do you stipulate the case may be reopened for that, subject to your objection as to its—

Mr. Wilson: May I see Exhibit I? I don't happen to have a copy of it. I don't know what it is about. (After examining) Subject to my general objection, I will stipulate that it may be offered now.

The Court: Very well, and it may be admitted in evidence as I-1, subject to the plaintiffs' objections.

[DEFENDANT'S EXHIBIT I-1]

WESTERN LOAN AND BUILDING COMPANY

Inter-Office Stationery
Oakland Real Estate Sales

To Mr. C. J. Sumner, General Manager

From Mr. F. E. Sullivan, California Sales Manager

Date April 5, 1944

Subject

R.E. 4427 Norman Manor Apts.

R.E. 4430 Norman Manor Annex

San Bernardino, California

Dear Mr. Sumner:

This will advise you that we hold an offer to purchase the above properties, adjoining buildings, on the following terms:

Sale price: \$86,750.00

Cash: 21,000.00

Balance of 65,750.00 to be paid at rate

of \$591.75 per month including 6% interest. Purchasers to have the privilege of paying additional principal payments of \$4,931.25 in any one calendar year and the entire balance due at the end of 120 months.

We hold a 5% deposit in the amount of \$4,337.50.

The purchasers are Mr. Albert C. Arthur and H. B. and Catherine Estes.

Mr. H. B. Estes is also the broker in the transaction and will receive \$4,000.00 commission from the closing escrow.

(Defendant's Exhibit I-1)

The offer was increased over an original offer of \$85,000.00 to allow for the additional commission and to permit Mr. Estes to participate as buyer. Mr. Arthur, a San Bernardino jeweler, is undoubtedly supplying most of the cash payment, but he and Mr. Estes are associated as owners of other properties, Mr. Estes attending to their operation.

We have contacted these people many times and as the offer represents all the property is worth on the present market we are ordering the independent appraisals by Messrs. Saint and Schmutz. If Mr. Schmutz is not available we will submit the offer with only one appraisal.

We will keep you advised.

Very truly yours,

F. E. Sullivan

California Sales Manager

FES:JW

[Stamped]: Received 8:30 Apr 8 1944 Western Loan & Bldg. Co.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Mr. Wilson: With respect to Exhibit I itself—

The Court: With respect to Exhibit I itself, each objection heretofore made and enlarged in the record is overruled.

Mr. Mulliner: I guess we can stipulate that that is the letter that is referred to in Exhibit I?

The Court: I don't know. Here it is. You have not got Mr. Sullivan here—I mean, the general manager, Mr. Sumner. I suppose that he is the only one who can testify what was in his mind when he wrote that letter.

Mr. Mulliner: If that is the only communication from Mr. Sullivan outlining the deal, I can ask Mr. Sullivan that, [215] unless he is willing to stipulate.

Mr. Wilson: These are all matters that transpired in your office. We don't have any knowledge of it.

Mr. Mulliner: Mr. Sullivan would say that that was the only letter in which he reported this deal to Mr. Sumner at that time or approximately that time.

Mr. Wilson: Subject to my objection to it as incompetent, irrelevant, immaterial, and hearsay.

Mr. Mulliner: And it bears the evidence that it was in the Salt Lake Office. It bears the Salt Lake Office receiving stamp.

The Court: It is in evidence for whatever it is. Your offer is that if Mr. Sullivan were called to the stand he would testify that this is the only letter which he wrote on April 5th which related to this transaction?

Mr. Mulliner: That is right.

The Court: And you will stipulate to that, subject to your objection as to its competency, relevancy, and as to its being hearsay?

Mr. Wilson: And lack of foundation; that he would so testify.

The Court: All right.

Mr. Mulliner: Your Honor, if I could just have one other word, we are particularly anxious to test out one

or two of these legal questions, and so the findings of fact are very important to us here. If it would be of any assistance in [216] working out these findings of fact, we would be willing to order a transcript of the testimony in order that that could be available to determine and discuss those questions. In other words, we would like a record.

The Court: You can do it if you want to. Under the rule the plaintiff is now ordered to prepare the findings of fact and conclusions of law, and under the rule they must be served upon the opposite side, which has five days within which to file objections to them. If you do not have time to do it within five days, I will extend the time at that time. If you want the transcript to help you make your objections you can buy the transcript.

Mr. Mulliner: Your Honor can appreciate my situation, that if this ruling is made on the legal question we are able to be guided by it in our practice.

The Court: I understand thoroughly. You do not need to apologize to me for wanting to make a record to protect yourselves on appeal.

Mr. Mulliner: I appreciate that.

The Court: The judgment is for the plaintiffs, and the plaintiffs' counsel is ordered to draw findings of fact and conclusions of law, and I will make the order now that when they are served upon the defendant he shall have 10 days from that date within which to make any objections.

You understand the rule is that if you order the transcript the original is filed and you receive a copy? [217]

Mr. Mulliner: I didn't know it but I appreciate your Honor telling me.

The Court: The original goes in the file of the court.

Mr. Wilson: May I ask a question? Is there a time limit on the preparation of findings?

The Court: No.

Mr. Wilson: I will try to get them in before the end of this week.

The Court: I won't get a chance to look at them for some time.

Mr. Mulliner: May I say that I appreciate your Honor's permitting me to proceed.

The Court: That is all right. You don't need to express any appreciation at all. I am very happy to extend the courtesy and I thank you for your presentation of the matter. I am sorry I cannot agree with you.

[Endorsed]: Filed Jun. 1, 1945. [218]

[Endorsed]: No. 11075. United States Circuit Court of Appeals for the Ninth Circuit. Western Loan and Building Company, a Corporation, Appellant, vs. Albert C. Arthur and H. B. Estes, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California. Central Division.

Filed June 15, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11075

WESTERN LOAN AND BUILDING COMPANY,
a corporation,

Appellant,

vs.

ALBERT C. ARTHUR and H. B. ESTES,

Appellees.

APPELLANT'S (1) DESIGNATION OF RECORD
and (2) STATEMENT OF POINTS ON AP-
PEAL

To the Above Entitled Court and Paul P. O'Brien, its
clerk and to the Appellees, Albert C. Arthur and
H. B. Estes and their attorney, Fred A. Wilson:

Notice Is Hereby Given by the appellant, Western Loan
and Building Company in connection with its appeal in
case No. 3815-PH-Civil to this court that following are:

I.

Designation of Record

For the record herein the appellant hereby designates
for printing the record in its *entirely* as certified to the
above entitled court by the Clerk of the United States
District Court, Southern District of California, Central
Division (which record was prepared by the Clerk of the
District Court as a full and complete record of all pro-
ceedings and evidence in this action pursuant to appel-
lant's Designation of Record on Appeal to the Clerk of
the District Court dated June 1, 1945).

II.

Statement of Points on Appeal

Following is a concise statement by appellant of the points upon which it intends to rely in this appeal:

(a) The rulings, orders and judgment of the trial court appealed from are not supported by the evidence.

(b) The rulings, orders and judgment of the trial court appealed from are against the law.

(c) The failure and refusal of the trial court to make findings of fact upon material issues which were joined. Some of these being:

(1) Did Mr. Carron, in a telephone conversation on April 24, 1944, state to Mr. Arthur that the deal had been approved by the Salt Lake office of appellant company and then arrange for taking the inventory of the furnishings?

(2) Did Mr. Sullivan, by telephone, May 8, 1944, inform Mr. Arthur of the acceptance of the deal by the appellant and of the receipt by Mr. Sullivan of the papers to close the deal, and was his call before or after the receipt by the company of appellees' night telegrams and letters withdrawing their offer?

(3) Considering the offer and the previous transactions with appellees and the escrow instructions and the statement in appellees' bill of particulars concerning the \$4,337.50 deposit, would this have been applied as a payment if the deal had been closed, and was it so intended by the parties hereto?

(d) The evidence does not support the Findings of Fact and Conclusions of Law signed by the trial court.

(e) The Findings of Fact do not support the judgment.

(f) The trial court erred in refusing to admit evidence offered by appellant on the question of liquidated damages and improperly limited the evidence offered by appellant under the general denial in appellant's answer.

(g) The trial court abused its discretion in denying appellant's motion made during the trial for leave to amend its answer by setting up as a special defense that appellant was entitled to keep the \$4,337.50 deposit as liquidated damages.

(h) The trial court erred in rejecting the evidence offered by appellant with respect to prior dealings between the parties in similar transactions involving the same form of offer to purchase as an aid in construing the offer to purchase and the significance of the inventory taking.

(i) The trial court failed to grasp the reason for taking the inventory.

(j) A verbal acceptance is sufficient.

(k) A verbal acceptance of a written offer to purchase land is sufficient to defeat a defaulting purchaser's right to recover the down payment where the vendor is ready, able and willing to complete the sale.

(l) Appellees' offer to purchase did not expire May 1, 1944, but remained open until May 15, 1944.

(m) Assuming (but not conceding) that the offer to purchase expired May 1, 1944 nevertheless appellees by their acts waived this time limit and there was a timely acceptance by appellant thereafter.

(n) Appellees attempts to revoke their offer to purchase followed timely acceptances by appellant and they were, consequently, ineffectual.

(o) The trial court misconstrued the nature of the written offer to purchase and the effect of the provisions contained in the offer to purchase.

(p) The liquidated damage provision in the offer to purchase is a valid provision.

(q) The offer to purchase was sufficiently definite and certain in its description—"furniture, furnishings and equipment".

(r) The trial court erred in denying appellant's motion for a nonsuit.

Dated: June 22, 1945.

H. L. MULLINER & M. PERELLI-MINETTI

By M. Perelli-Minetti

Attorneys for Western Loan and Building Company,
Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun, 25, 1945. Paul P. O'Brien,
Clerk.